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**No. 11,568**

IN THE

**United States Circuit Court of Appeals  
For the Ninth Circuit**

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INTERNATIONAL LONGSHOREMEN'S AND  
WAREHOUSEMEN'S UNION (CIO), et al.,  
*Appellants,*  
VS.

CABLE A. WIRTZ, as Judge of the Circuit  
Court of the Second Judicial Circuit,  
Territory of Hawaii, and MAUI AGRICULTURAL COMPANY, LIMITED,  
*Appellees.*

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**Upon Appeal from the Supreme Court of the  
Territory of Hawaii.**

**APPELLANT'S OPENING BRIEF.**

---

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**Upon Appeal from the Supreme Court of the  
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**APPELLANT'S OPENING BRIEF.**

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**OPINION BELOW.**

The opinion of the Supreme Court of the Territory is reported in 37 Haw. 404. The opinion denying the petition for rehearing is reported in 37 Haw. 445. Both opinions are set forth in full in the Appendix.

**JURISDICTION.**

This is an appeal from a final decision of the Supreme Court of the Territory of Hawaii in a proceeding for a perpetual writ of prohibition brought by the International Longshoremen's and Warehousemen's Union, CIO, Local 144 of the International Longshoremen's and Warehousemen's Union, CIO, and certain of its officers and members against Cable A. Wirtz, as Judge of the Circuit Court of the Second Judicial Circuit, Territory of Hawaii, and the Maui Agricultural Company, Limited. The writ sought was to prohibit the respondents from taking any further action in a certain equity case involving or growing out of a labor dispute in which an ex parte restraining order was issued and contempt process instituted without complying with the terms of the Norris-La-Guardia Act (47 Stat. 70, 29 U.S.C. 101-115).

The Petition for Writ of Prohibition is set forth at page 15 of the Transcript. The Answer and Return of the respondent Wirtz appears at page 45 of the Transcript, and the Return To Order to Show Cause of the respondent Maui Agricultural Company at page 55 of the Transcript.

The jurisdiction of the Supreme Court of the Territory of Hawaii is based on Section 81 of the Organic Act of the Territory (31 Stat. 141, 48 U.S.C. 631) and statutes enacted pursuant thereto. Section 9604 of the Revised Laws of Hawaii 1945 gives the Supreme Court original jurisdiction in questions arising under writs of prohibition directed to circuit courts or to circuit court judges. Sections 10270-10278 of the Re-

vised Laws of Hawaii 1945 define the writ of prohibition and the jurisdiction and power of the court in respect thereto.

The decision of the Supreme Court was made on December 4, 1946 (R. 58-70). Judgment was entered on December 18, 1946 (R. 71-72). The Petition for Rehearing was denied January 23, 1947 (R. 77-79). Plaintiff's petition for appeal to this court was allowed on February 21, 1947 (R. 2-5).

The jurisdiction of this court is based upon the fourth provision of Section 129(a) of the Judicial Code (28 U.S.C. 225), this appeal being from a final decision of the Supreme Court of the Territory involving the construction and application of the Norris-LaGuardia Act, to territorial courts.

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#### **STATUTES INVOLVED.**

The Norris-LaGuardia Act is printed in full in the Appendix, *infra*.

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#### **QUESTION PRESENTED.**

Are territorial courts "courts of the United States" as defined by and within the meaning of the Norris-LaGuardia Act, and are the provisions of that Act applicable in the Territory of Hawaii?

**STATEMENT OF THE CASE.**

This is an appeal from a decision of the Supreme Court of the Territory of Hawaii, holding that territorial courts are not subject to or affected by the provisions of the Norris-LaGuardia Act, and denying a petition for a perpetual writ of prohibition against the Judge of a circuit court who, without complying with the provisions of the Norris-LaGuardia Act, entered an ex parte temporary restraining order against certain types of picketing in a case involving and growing out of a labor dispute.

The Maui Agricultural Company, Limited (respondent below, appellee herein, hereinafter referred to as the respondent company) petitioned the Second Circuit Court of the Territory for an injunction restraining the union representing its employees and certain of its officers and members who were then on strike from certain types of picketing and for an order to show cause why such an injunction should not issue against said union and its members (R. 23-32). On motion of the company (R. 32-35), Cable A. Wirtz as Judge of said court (respondent below, appellee herein, hereinafter referred to as the respondent judge) issued an ex parte temporary restraining order against certain types of picketing by the union, its officers and members (R. 39-42). Contempt proceedings for violations of this ex parte temporary restraining order were instituted in said circuit court.

The union and its officers and members (petitioners below, appellants herein, hereinafter referred to as the union) against whom the ex parte temporary re-



straining order was issued petitioned the Supreme Court of the Territory for a writ of prohibition restraining the respondent judge and the respondent company from taking any further action in, except to dismiss, said proceeding (R. 15-21).

The petition for the writ of prohibition alleged that the petitioners were trade unions, their officers and members; that the respondent judge was the regularly appointed and acting judge of the circuit court of the Second Judicial Circuit of the Territory of Hawaii; that the respondent company had filed in said court a petition for injunction and had applied for and been issued by the respondent judge an ex parte temporary restraining order; that at the time of the filing of said petition for injunctive relief, there was a labor dispute in progress between the respondent company and the union; that the said circuit court is a court of the United States as defined by the Norris-LaGuardia Act; that under the Norris-LaGuardia Act no court of the United States has jurisdiction to issue an injunction or restraining order in a labor dispute without complying with the provisions of that Act; that the petition for injunction showed on its face that the respondent company had not complied with the terms of said Act; that the respondent judge and said circuit court were without jurisdiction to proceed further, or to proceed at all, in said case; that the respondent judge and the respondent company threatened to take further proceedings in said cause.

The union, therefore, prayed the Supreme Court of the Territory of Hawaii for an order against the

respondent judge and the respondent company showing cause why a perpetual writ of prohibition should not be issued prohibiting them from proceeding further in, except to dismiss, said cause, and pending hearing on said order to show cause, the issuance of a temporary writ of prohibition against the respondents.

The Supreme Court thereupon issued a Temporary Writ of Prohibition against the respondents and an order to show cause why a perpetual writ should not be issued (R. 42-44).

The answer and return of the respondent judge (R. 45-55), in so far as here relevant, admitted the existence of a labor dispute and the non-compliance with the Norris-LaGuardia Act but denied that the Norris-LaGuardia Act had any application to a circuit court of the Territory or a circuit court judge sitting in equity or that the terms and conditions of said Act had any bearing on the propriety or validity of the respondent judge's acts in connection with the issuance of the said ex parte temporary restraining order.

The return of the respondent company (R. 55-57) admitted the existence of a labor dispute and that its petition did not comply with all of the provisions of the Norris-LaGuardia Act but denied that the Act limited or in any way affected the jurisdiction of circuit courts of the Territory.

After hearing, the Supreme Court of the Territory, in an opinion by Le Baron, J., held that territorial courts are not courts of the United States as defined

by and within the meaning of the Norris-LaGuardia Act and that the provisions of the Norris-LaGuardia Act are not applicable in the Territory of Hawaii (R. 57-70), and entered judgment dissolving the temporary writ and dismissing the petition for a perpetual writ.

The union filed a petition for re-hearing and re-argument (R. 73-76) which was denied by the court (R. 77-79).

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### **ASSIGNMENTS OF ERROR.**

**(R. 5-7, 102-3.)**

1. The Supreme Court of the Territory of Hawaii, hereinafter referred to as the "Court", erred in making and entering its Opinion and Decision on the 4th day of December, 1946, in the above-entitled court and cause.

2. The Court erred in making and entering its Judgment on the 19th day of December, 1946, in the above-entitled court and cause.

3. The Court erred in making and entering its Opinion and Decision denying the Petition for Re-hearing on the 23rd day of January, 1947, in the above-entitled court and cause.

4. The Court erred in its conclusion that a circuit court of the Territory is not a "court of the United States" as defined by and within the meaning of the Norris-LaGuardia Act.

5. The Court erred in its conclusion that Congress manifested an intention to and did exclude from the coverage of the Act legislative Courts of the United States.

6. The Court erred in failing to give to the Norris-LaGuardia Act the same scope and coverage as the Clayton and Sherman Acts which the Norris-LaGuardia Act amended.

7. The Court erred in failing to construe the Norris-LaGuardia Act as an exercise by Congress of its plenary power to legislate for the Territory of Hawaii.

8. The Court erred in construing the Norris-LaGuardia Act as a narrow procedural act affecting only the jurisdiction of constitutional courts sitting in equity.

9. The Court erred in failing to give effect to the public policy of the United States declared in the Norris-LaGuardia Act.

10. The Court erred in holding that the defendant Cable A. Wirtz as Judge of the Circuit Court of the Second Judicial Circuit had jurisdiction to issue a temporary restraining order in a case growing out of a labor dispute.

11. The Court erred in dissolving the temporary writ in dismissing the petition for writ of prohibition, and in denying a permanent writ of prohibition against the defendants below, appellees here.

**SUMMARY OF ARGUMENT.****I.**

Territorial courts, including the circuit courts of the Territory of Hawaii, are subject to the provisions of the Norris-LaGuardia Act because they are courts whose jurisdiction is conferred, defined, and limited by Act of Congress. Section 13(d) of the Norris-LaGuardia Act defines the words "courts of the United States" as used in the Act as "any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia." Territorial courts were created by Congress and their jurisdiction was conferred, defined and limited by Congress, and they are at all times subject to its plenary control.

By the terms of Section 1 of the Norris-LaGuardia Act, Congress conditioned the exercise of jurisdiction of courts subject to the Act in cases involving or growing out of labor disputes on strict compliance with the provisions of the Act. The respondents having admitted the existence of a labor dispute and failure to comply with the provisions of the Act, the respondent as judge of the Second Circuit Court of the Territory was wholly without jurisdiction to proceed.

**II.**

The legislative definition of the words "courts of the United States" is unambiguous and expressly includes territorial courts. Hence there is no need to

resort to any principles of statutory construction to resolve an ambiguity in meaning or to determine Congressional intent, as the lower court does.

In reaching its conclusion that Congress manifested an intention to exclude legislative courts from the coverage of the Norris-LaGuardia Act, the Court relies on the amendatory effect of the Norris-LaGuardia Act, the title of the Act, the existing judicial distinction between constitutional and legislative courts, the legislative definition and Section 10 of the Act.

An examination of these interdependent premises shows that they do not support the court's conclusion, that they are either erroneous in themselves or furnish no basis for construing Congressional intent.

Thus the Court uses the fact that the Norris-LaGuardia Act amends the Clayton Act, portions of which are incorporated in the Judicial Code, as justifying turning to the Judicial Code to determine the meaning of "court of the United States" as used in and defined by the Norris-LaGuardia Act.

The amendatory effect of the Norris-LaGuardia Act to the Clayton Act is, however, not directed to those sections of the Act that are incorporated in the Judicial Code, as the Court below assumes.

Section 20 of the Clayton Act, which the Norris-LaGuardia Act amends, shows that the very phrase "court of the United States" which the Court is construing is used therein to include both constitutional and legislative Courts.



If Congress had intended the words "courts of the United States" in their technical judicial sense, as the lower court holds, there was no necessity to define the term for the purposes of the Act. By its elaborate series of interdependent premises, which in themselves are erroneous, the court attempts to explain away the controlling legislative definition with the absurd end result that the definition is interpreted as being court of the United States means "court of the United States".

Neither the title of the Act, the legislative definition nor Section 10 of the Act furnish any evidence that Congress intended the words "courts of the United States" to be used in the narrowest possible sense and to exclude legislative courts of the United States.

### III.

The Norris-LaGuardia Act must be given the same scope and coverage as the Sherman and Clayton Acts which it amends.

The Sherman Act and the Clayton Act specifically apply to the Territory of Hawaii. Thus under Section 1 of the Clayton Act commerce is defined as commerce between or in and within the Territories of the United States. Under both these acts the Supreme Court has held that Congress exercised its full and plenary power. *United States v. Frankfort Distilleries*, 65 S. Ct. 661; *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 495. In *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, the Supreme Court held that the power exercised by Congress in the enactment of the pro-

vision of Section 3 of the Sherman Act within the District of Columbia, was its plenary power to legislate for the district. The language used in respect to the District and the Territories in both the Sherman and Clayton Acts is identical. It, therefore, is clear that both these acts apply fully to the Territory and constitute an exercise by Congress of its conceded plenary power to legislate for the Territory.

If the Norris-LaGuardia Act, as an amendatory act, is not given the same scope and geographical effect, the absurd result follows that unamended Clayton and Sherman Acts are in effect in the Territory.

The obligations of enforcement and restraints on jurisdiction under the Sherman and Clayton Acts are placed on the federal district Court for the Territory of Hawaii which is a legislative Court. The Congress cannot, then, have intended to exclude legislative Courts from the scope of the Norris-LaGuardia Act. This being true, there is no basis for excluding Circuit Courts of the Territory from the coverage of the Act.

#### IV.

The Norris-LaGuardia Act, like the Sherman and Clayton Acts, is an exercise by Congress of its plenary power to legislate for the Territory.

As interpreted by the Supreme Court in the *Hutcheson* case, the Clayton and Norris-LaGuardia Acts

1. exempt labor organizations engaged in labor disputes from the anti-trust acts,

2. drastically limit the power of Courts to issue injunctions in labor disputes,

3. specifically make ~~un~~lawful all the labor union activity defined in the Norris-LaGuardia Act.

Since the power of the territorial legislature is limited to laws not inconsistent with laws of the United States locally applicable, the legislature could not confer, and a Circuit Court does not have, power to enjoin acts specifically made lawful under *all* laws of the United States.

## V.

The Norris-LaGuardia Act is not a narrow procedural Act. It confers substantive rights on all persons and organizations in the territories and possessions of the United States for whom Congress can constitutionally legislate.

“The Norris-LaGuardia Act”, the Supreme Court said in the *Hutcheson* case, “reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light Section 20 removes all such allowable conduct from the taint of being ‘*violations of any law of the United States*’, including the Sherman Law”.

These substantive rights accrue to members of labor unions and labor unions in the Territory. Thus in Section 1 of the Clayton Act “person” is defined “wherever used in this act” (which certainly includes section 6 and section 20) as including corporations and

associations of the Territory. Obviously it also applies to natural persons within the Territory.

These substantive rights cannot be held to be violations of any law of the United States, their exercise cannot be made the subject of criminal proceeding and the rights cannot be interfered with by injunctions.

To construe the Act as inapplicable to Circuit Courts of the Territory permits these rights to be drained of all substance in violation of the express provisions of the Act.

## VI.

The Norris-LaGuardia Act must be interpreted to effect the declared public policy of the United States.

From the public policy of the Act—as declared by Congress, as interpreted by the Supreme Court of the United States, and as the congressional debates show Congress intended it should be interpreted—it is apparent that Congress intended by the Act to establish a new era of labor relations in the United States in so far as it was within the power of Congress to do so.

The Supreme Court has held, and the congressional debates indicate, that the policy was the law, the procedural provisions were incidental to the accomplishment of the purpose.

The Norris-LaGuardia Act abrogated the common law and judicial decisions written over a period of many years because Congress deemed it in the interest of the general welfare to protect the rights of Ameri-

can workers to organize. Can it be presumed that Congress intended to permit the cancerous condition that gave rise to the Norris-LaGuardia Act to continue to plague the two and one-half million peoples in the territories and possessions of the United States over which Congress has plenary control?

There is no word in the Act that justifies such a construction, and to so construe the Act defeats, nullifies and destroys the intent of Congress as shown in its declaration of policy.

## VII.

If the intent of Congress is to be effected, there is only one alternative construction to holding the Norris-LaGuardia Act applicable to a Circuit Court of the Territory. That is to construe the Act as manifesting an intention to confer exclusive jurisdiction, subject to limitations contained in the Act, on the federal District Court for the Territory of Hawaii to issue injunctions in cases involving or growing out of labor disputes.

This construction would fully effect the purposes of the Act and would not be inconsistent with its provisions.

## CONCLUSION.

The perpetual writ should have been granted. By virtue of the Norris-LaGuardia Act, the respondent judge was without jurisdiction to proceed either because Circuit Courts of the Territory are Courts as defined in the Act, or because the Act confers substan-

tive rights to engage in the activity restrained in said ex parte temporary restraining order, or because only the federal District Court of the Territory can issue injunctions in cases involving or growing out of labor disputes.

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## ARGUMENT.

### I.

CIRCUIT COURTS OF THE TERRITORY OF HAWAII ARE SUBJECT TO THE PROVISIONS OF THE NORRIS-LaGUARDIA ACT BECAUSE THEY ARE COURTS WHOSE JURISDICTION IS CONFERRED, DEFINED AND LIMITED BY ACT OF CONGRESS.

#### Assignment of Error No. 4.

The Court erred in its conclusion that a circuit court of the Territory is not a "court of the United States" as defined by and within the meaning of the Norris-LaGuardia Act.

Section 1 of the Norris-LaGuardia Act conditions on strict conformity with the provisions of the Act and the public policy declared therein the existence of jurisdiction of Courts sitting in equity to issue restraining orders and injunctions in cases involving or growing out of labor disputes. It provides (47 Stat. 70, 29 U.S.C. 101):

That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this Act; nor shall any such



restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

Congress did not leave to Courts for judicial construction the phrase "court of the United States." It placed its own construction on that phrase. By Section 13 it provided, "*When used in this Act, and for the purposes of this Act,*"

The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

It is well settled that a statutory definition of terms must be given effect to and is controlling on Courts. If the statutory definition varies from the commonly accepted dictionary, technical or judicial definition, the statutory definition supersedes such meanings. 50 Am. Jur. Stat., Sections 254, 262.

Territorial Courts are legislative courts of the United States, subject to the plenary power and control of Congress. The nature of territorial courts is described as follows in *Constitution of the United States*, Revised and Annotated, 1938, p. 547:

Territorial courts are legislative courts created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the

third article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the Territories of the United States. It is within the competency of Congress either to define directly, by their own act, the jurisdiction of the courts created by them or to delegate the authority requisite for that purpose to the Territorial government; and by either proceeding to permit or to deny the transfer of any legitimate power or jurisdiction previously exercised by the courts of the provisional government to the tribunals of the government they were about to substitute for the Territory in lieu of the temporary or provisional government. The Territorial governments are legislative governments, and their courts legislative courts; Congress, in the exercise of its powers in the organization and government of the Territories, combines the powers of both the Federal and State authorities.

The legislative definition of the term "court of the United States" in Section 13 of the Norris-LaGuardia Act is clear and unambiguous. It embraces any Court which exists by virtue of the authority of the United States and whose jurisdiction has been or may be conferred *or* defined *or* limited by Act of Congress.

Circuit courts of the Territory were created and their jurisdiction both has been and may be conferred, *and* defined *and* limited by Act of Congress. A review of some of the Acts of Congress relating to territorial courts indicates the extent to which Congress has exercised its plenary power over territorial courts.

By its Joint Resolution of July 7, 1898 (Resolution No. 55 of July 7, 1898, 30 Stat. 750), annexing the Hawaiian Islands to the United States, Congress accepted the cession to the United States by the Government of the Republic of Hawaii of "all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies".

In the period between July 7, 1898, and the enactment by Congress of the Organic Act of April 30, 1900, Congress exercised the sovereignty ceded to it by delegating to the existing officers of the Republic of Hawaii—civil, judicial and military—the government of the Islands, subject to direction by the President of the United States. The Joint Resolution provided:

Until Congress shall provide for the government of such Islands all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct \* \* \*

In this period between the adoption of the Organic Act and the Resolution of Annexation the courts of the Territory were courts of the United States exercising power by virtue of delegation of authority by Congress.

With the adoption of the Organic Act (Act of April 30, 1900, 31 Stat. 141), Congress conferred jurisdiction to exercise the judicial power of the Territory on the Supreme Court, circuit courts and

in such inferior courts as the legislature might establish. Section 81 of the Organic Act (48 U.S.C. 631) provided:

That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the civil courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided.

Section 83 of the Organic Act, 48 U.S.C.A. 635, continued the laws of Hawaii relative to the Judicial Department, including civil and criminal procedures, except as amended by the Organic Act itself, and *subject to modification by Congress or the Legislature.*

Under no construction of the language of Section 81-83 of the Organic Act can any conclusion be reached other than that the Congress of the United States conferred jurisdiction on the Supreme and circuit courts of the Territory of Hawaii.

Nor did Congress stop with the conferring of jurisdiction. It defined and limited the general grant of jurisdiction to the Supreme and circuit courts of the Territory in several respects.

By Section 5 of the Organic Act, 48 U.S.C.A. 495, Congress limited the power of the Legislature, as well as of the courts, by providing that the Constitution of the United States and *all laws of the United*

*States not locally inapplicable* should have the same force and effect within the Territory as elsewhere in the United States.

By Section 6 of the Organic Act, 48 U.S.C.A. 496, Congress continued in force only those laws of the Republic of Hawaii not inconsistent with the Constitution or laws of the United States or the Organic Act, and made these laws which were continued subject to repeal or amendment by it or by the Legislature of Hawaii.

By Section 55 of the Organic Act, 48 U.S.C.A. 519, 562, Congress placed residence limitations on the jurisdiction of the courts of the Territory—as well as the power of the legislature—to grant divorces.

By Section 80 of the Organic Act, 48 U.S.C.A. 546, 633, Congress empowered the President of the United States to nominate, by and with the advice and consent of the Senate, the Chief Justice and Justices of the Supreme Court and the judges of circuit courts. Congress likewise provided for the term of office of circuit court judges and provided that their salary should not be diminished during their term of office.

By Section 83 of the Organic Act, 48 U.S.C.A. 635, Congress empowered circuit court judges to determine the times at which grand juries shall sit and to subpoena witnesses to appear before the grand jury.

By Section 84 of the Organic Act, 48 U.S.C.A. 636, Congress prohibited judges of the Territory (which includes circuit judges) from sitting in cases in

which a judge or his relatives were pecuniarily or otherwise interested, and delegated to the Legislature the power to add other causes of disqualification.

By Section 86 of the Organic Act, 48 U.S.C.A. 641-645, Congress granted to the Federal District Court of Hawaii the jurisdiction of District Courts of the United States. In effect this divested the circuit and Supreme Courts of the Territory of jurisdiction previously exercised by them after the Resolution of Annexation, as for example jurisdiction in admiralty. *Carter v. Second Judge*, 16 Haw. 242, 255.

By Section 92 of the Organic Act, 48 U.S.C.A. 536, 539, 634, Congress fixed the annual salary of circuit court judges of the Territory of Hawaii and provided that they should be paid by the United States.

It is clear from these provisions of the Organic Act that from the outset circuit courts of the Territory were created, their jurisdiction was conferred, and their powers were defined and limited by Act of Congress.

Nor are the provisions of the Organic Act and the amendments thereto from time to time the only instance in which Congress has conferred or defined the jurisdiction of circuit courts of the Territory. For example, on July 10, 1937, and November 26, 1941, by Section 703 of the Hawaiian Homes Commission Act (48 U.S.C. 691-718), Congress conferred jurisdiction to approve guardians on the "court of proper jurisdiction". By Section 711 Congress empowered the Commission to

(1) bring action of ejectment or other appropriate proceedings or (2) invoke the aid of the *circuit court of the Territory* for the judicial circuit in which the tract designated in the commission's order is situated. Such court may thereupon order the lessee or his successor to comply with the order of the commission. Any failure to obey the order of the court may be punished by it as contempt thereof.

Congress also repealed all laws of the Territory inconsistent with the Hawaiian Homes Commission Act.

It is thus clear that not only does Congress possess plenary power over territorial Courts, but that it has exercised this power over Circuit Courts of the Territory and has conferred, defined and limited their jurisdiction. Circuit Courts fall squarely within the phrase of "court of the United States" when used in and for the purpose of the Norris-LaGuardia Act. Thus they have no jurisdiction to issue restraining orders or injunctions in cases involving or growing out of labor disputes without complying with the provisions of the Act. The respondents admitted the existence of a labor dispute and their failure to comply with the provisions of the Act. The Supreme Court of the Territory was therefore required by law to issue a perpetual writ prohibiting the respondents from proceeding in the equity action complained of since the Court was without jurisdiction.

## II.

**CONGRESS MANIFESTED NO INTENT TO EXCLUDE LEGISLATIVE COURTS FROM THE COVERAGE OF THE ACT.****Assignment of Error No. 5.**

The Court erred in its conclusion that Congress manifested an intention to and did exclude from the coverage of the Act legislative Courts of the United States.

For the reasons set forth under Point I, we find no ambiguity in the legislative definition of Courts contained in the Norris-LaGuardia Act necessitating or justifying resort to extraneous manifestations of Congressional intent. But the Court below assumes from the outset that the Congressional definition of Court contained in the Act is ambiguous and looks elsewhere to find the Congressional intent.

Briefly, the Court's theory that Congress manifested an intention to and did exclude legislative Courts from the coverage of the Act is developed as follows: The Court first determines that the Norris-LaGuardia Act is amendatory of the Clayton Act and professes by its title to be an amendment to the Judicial Code which "significantly contains portions of the Clayton Act". The Court then uses the reference in the Title to the Judicial Code and the presence of portions of the Clayton Act in the Code to justify turning to the history of the federal judiciary and to the Judicial Code to determine the meaning of "court of the United States" as used in the Norris-LaGuardia Act. It finds a judicial distinction has been made between Courts established under Article III of the Constitution



which are termed constitutional Courts and Courts established under Article IV of the Constitution which are called legislative Courts. It further finds that the Judicial Code deals "primarily" with constitutional Courts, and refers to them as "courts of the United States". The Court therefore deduces the intention of Congress to use "court of the United States" in the Norris-LaGuardia Act to mean only Courts established under Article III of the Constitution. The Court then turns to the Act and finds corroborative evidence of this intention in the legislative definition and in Section 10 of the Act.

None of the premises relied on by the Court supports its conclusion that Congress manifested an intention to exclude legislative Courts from the coverage of the Act. We shall discuss *seriatim* each premise relied on by the Court to deduce this intent.

#### A. THE NORRIS-LaGUARDIA ACT AS AN AMENDMENT TO THE CLAYTON ACT.

That the Norris-LaGuardia Act effects amendments in the Clayton Act is clear, as the Court below point out, from *United States v. Hutcheson*, 312 U.S. 219, 85 L. ed 788. But it is almost inconceivable that the Court below could use this fact as a link in a chain of logic supporting the narrowest possible construction of the Norris-LaGuardia Act—that is, its application to only one class of courts for which Congress can legislate. The Supreme Court in the *Hutcheson* case shows that it is the very interrelation between the two Acts that wrought a revolution in

labor's rights and overthrew a quarter of a century of Supreme Court decisions affecting labor.

The very language the lower court quotes from the *Hutcheson* case to show the amendatory effect implies the sweeping effect and broad scope of the Norris-LaGuardia Act:

The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction.

When this language is put back into context in the paragraph from which it is quoted, the Supreme Court's rejection of a narrow construction of the Act becomes startlingly clear. The Supreme Court prefaces the statement with a rejection of a technical construction of the Act:

The relation of the Norris-LaGuardia Act to the Clayton Act is not that of a tightly drawn amendment to a technically phrased tax provision.

After stating the underlying aim of the Act, the Court continues:

This was authoritatively stated by the House Committee of the Judiciary. "The purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act \* \* \* which Act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent." \* \* \* The Norris-LaGuardia Act was a disapproval of *Duplex Printing Press*

*Co. v. Deering* \* \* \* and *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Association* \* \* \* as the authoritative interpretation of Section 20 of the Clayton Act, for Congress now placed its own meaning on that section. The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light section 20 removes all such allowable conduct from the taint of being "violations of any law of the United States", including the Sherman Law.

If the fact that the Norris-LaGuardia Act is amendatory of the Clayton Act is to be used to assist in resolving any ambiguity in Congressional intent in respect to the scope and coverage of the Act, surely the construction arrived at must at least give the amendatory Act the same scope and coverage as the Act which it amends.

By Section 1 of the Clayton Act (38 Stat. 730, 29 U.S.C. 53) the word "person" or "persons" wherever used in the Act—and this certainly includes Section 20 to which the Norris-LaGuardia Act relates—is defined as including "corporations and associations existing under or authorized by the laws of either the United States," or "the laws of any of the Territories". "Commerce" is defined to include trade and commerce between the Territories, the District of Columbia and any State, and trade and commerce within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States."

“Court of the United States” as used in Section 20 of the Clayton Act includes *both constitutional Courts and legislative Courts of the territories and possessions of the United States, as will be clearly shown under Point III.*

In the Clayton Act, including Section 20, Congress exercised its plenary power to legislate for the Territory of Hawaii. By all settled rules of construction and logic the amendatory act must likewise be considered an exercise of Congress’ power to legislate for the Territory.

#### B. THE TITLE OF THE ACT.

From its determination that the Norris-LaGuardia Act is amendatory of the Clayton Act, the Court turns for further manifestation of Congressional intent to the title of the Act, saying:

Consistent therewith, the Norris-LaGuardia Act by its caption “An Act to Amend the Judicial Code \* \* \*” professes to be an emendation of that Code which significantly contains portions of the Clayton Act.

The Court sets forth only a portion of the title. Chapter 90 of the first Session of the 72nd Congress on March 23, 1932 (47 Stat. 70), shows that the full title of the Norris-LaGuardia Act is:

An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes.

What is the effect of the Title of an Act of Congress? And what weight should be given to it in

determining Congressional intent? Unlike some state constitutions, there is no requirement under the Constitution of the United States that acts shall have identifying captions or titles. Neither is there any restriction in the Constitution limiting Congress to one subject of legislation in each bill, such as is found in many state constitutions. Congress may enact several separate subjects in one bill. See *Chase Nat. Bank v. Mobile & O. R. Co.*, 30 F. Supp. 565.

The Supreme Court of the United States early decided that the titles of Congressional Acts furnish little aid in the construction of Congressional enactments. See, for example, *United States v. Union Pacific R. R. Co.*, 91 U. S. 72, 82, where the Court said:

It has been observed by this Court, that the title of an Act, especially in Congressional legislation, furnishes little aid in the construction of it, because the body of the Act in so many cases, has no reference to the matter specified in the title. *Hadden v. The Collector*, 5 Wall. 110. (Italics ours.)

Congress in framing and passing the Norris-La-Guardia Act enumerated two specific purposes in its caption, first an intent to amend the Judicial Code, second an intent to define and limit the jurisdiction of courts sitting in equity, and third an intent to accomplish other unspecified purposes. The Court ignores two provisions of the title and gives weight only to one provision. Thus the Court's construction of the title of this Act as an indication of an intent

to amend the Judicial Code only or primarily clearly violates and nullifies any legislative intent discernible from the title.

Because a portion of the title of the Act professes to amend the Judicial Code, the Court finds significance in the fact that portions of the Clayton Act are set forth in that Code. It relies on this fact to justify turning to the history of the federal judiciary and the Judicial Code to determine the meaning of "Court of the United States" as used in the Norris-LaGuardia Act. The Court says:

The portions of the Clayton Act (Oct. 15, 1914, c. 323, secs. 17-19, 21-25, 38 Stat. 737-740) incorporated into the Judicial Code at the time the Norris-LaGuardia Act was enacted all appear in chapter ten of the Judicial Code, constituting sections 381 to 383 and 386 to 390, inclusive, of the United States Code and all relate in subject matter to the Norris-LaGuardia Act.

But the Supreme Court in the *Hutcheson* case, *supra*, said that the Norris-LaGuardia Act amended Section 20 of the Clayton Act which deals with the rights of labor and is set forth in the labor code. What significance can properly be attached to the fact that irrelevant sections of the Clayton Act are incorporated in the Judicial Code?

But even the sections of the Clayton Act incorporated in the Judicial Code do not support the thesis of the court. Section 21 of the Clayton Act refers to "any district court of the United States, or any court of the District of Columbia". Since the Clay-

ton Act is an exercise of Congress' plenary power to legislate for the Territory, the phrase "district court of the United States" clearly covers the Federal District Court for the Territory of Hawaii which like a circuit court is a legislative court.

Neither the fact that the Act by its title professes to amend the Judicial Code nor the fact that some sections of the Clayton Act are incorporated in the Judicial Code in themselves indicate any intent to exclude legislative courts of the United States from its coverage, or justify turning to the Judicial Code to determine the meaning of "Court of the United States" as used in the Norris-LaGuardia Act.

#### C. THE JUDICIAL DISTINCTION BETWEEN CONSTITUTIONAL AND LEGISLATIVE COURTS.

Relying on its premise that the Norris-LaGuardia Act amends the Judicial Code, the Court turns to the history of the federal judiciary and the judicial code to determine the meaning of "Court of the United States". It finds a well recognized judicial distinction between courts established under Article III of the Constitution which are termed constitutional courts, and courts established under Article IV of the Constitution which are termed legislative courts. It concludes that the Judicial Code deals "primarily" with constitutional courts and refers to them as "Courts of the United States". The Court then asks:

In professing to amend the Judicial Code and in restoring the contemplated purpose of the Clayton Act, did Congress intend to go beyond the federal judicial system affected thereby and dis-

turb the meaning, established therein, of the phrases "courts of the United States" and "any court of the United States" in so far as it is limited to constitutional courts under Article III.

The Court answers the question in the negative.

But let us see what exigencies and what necessities gave rise to the distinction between legislative and constitutional courts.

In *Page v. Burnstine*, 102 U. S. 664, the Supreme Court held that a Congressional statute creating an exception to a general statutory rule of evidence was effective in the District of Columbia by virtue of the Congressional declaration that all laws of the United States not locally inapplicable should have the same force in the District as elsewhere within the United States. (Note that Section 5 of the Organic Act, 48 U.S.C. 495 contains the same provision.) The Supreme Court said:

The same considerations of public policy which would require the enforcement of such a statute \* \* \* in the Circuit and District Courts of the United States \* \* \* would suggest its application in the administration of justice in the courts of the district.

The Court very interestingly goes on to explain the effect of its decisions in *Clinton v. Englebrecht*, 13 Wall. 434, *Hornbuckle v. Toombs*, 18 Wall. 648, and *Good v. Martin*, 95 U. S. 90, which held that territorial Courts were not "Courts of the United States" as those words were used in the statutes being construed in those cases, saying:



These views do not at all conflict with the previous decisions of this court, holding that *certain provisions of the General Statutes of the United States relating to the practice and proceedings in the "courts of the United States"* are locally inapplicable to territorial courts. Those decisions, it will be seen, proceeded upon the ground, mainly, that the legislatures of the Territories referred to, in the exercise of power expressly conferred by Congress, had enacted laws covering the same subjects as those to which the General Statutes of the United States referred. It was, therefore, ruled that the territorial enactments, regulating the practice and proceedings of territorial courts, were not displaced or superseded by *general statutes* upon the same subjects passed by Congress in reference to "courts of the United States." *Clinton v. Englebrecht*, 13 Wall. 434, *Hornbuckle*, 18 id. 648, *Good v. Martin*, 95 U. S. 90. No such state of case exists here. The reasons assigned for the conclusion reached in those cases have no application to the question before us.

There is no statute in the Territory relating to the jurisdiction of Circuit Courts sitting in equity in cases involving or growing out of labor disputes. If, prior to the passage of the Act, Circuit Courts of the Territory had any power to issue injunctions in labor disputes, such power existed only by virtue of Section 81 of the Organic Act, 48 U.S.C. 631, and Sections 12401 and 12402 conferring a general power of equity on Circuit Courts. There is no conflict between a territorial act regulating the issuance of

injunctions in labor disputes and the Norris-LaGuardia Act. Hence, clearly within the rule laid down in the *Page* case no local law is being displaced or superseded.

The Norris-LaGuardia Act is not a general law, but a law dealing with a special subject—the rights of labor. Clearly Congress has the power to create exceptions to general laws of the Territory.

As we have seen, the Supreme Court in the *Page* case construed a provision identical to the provision in our Organic Act that all laws of the United States not locally inapplicable are in force in the Territory, as actually importing into the local laws all exceptions to general laws contained in Acts of Congress where it appears that the requirement of public policy which motivated the enactment apply with equal force in the Territory. That this is the case with the declared policy of the Norris-LaGuardia Act cannot be denied.

The Court cites *McAllister v. United States*, 141 U. S. 174 and *Mookini v. United States*, 303 U.S. 20 to support its conclusion that Congress manifested an *intent* to exclude territorial Courts from the scope of the Act because it used the words “Courts of the United States”. Thus the Court below says:

It is reasonable to assume that Congress used the two phrases, “courts of the United States” and “any court of the United States” coextensively with the scope of the Act with respect to the courts affected thereby and advisedly in the historical meaning of constitutional courts, con-

tradistinguished from legislative courts, which those phrases have concededly acquired by legislative use and judicial interpretation. (See *McAllister v. United States*, 141 U. S. 174, 35 L. ed. 693; *O'Donoghue v. United States*, 289 U. S. 516, 77 L. ed. 1356; *Mookini v. United States*, 303 U. S. 201, 82 L. ed. 748.) Further, Congress is presumed to have been aware of and have intended to adopt such meaning, especially when it employs in the existing and related Judicial Code the same phrases of identical import to denote courts vested with the judicial Power of the United States by Article III of the Constitution.

The *O'Donoghue* case will be discussed below. The *Mookini* case, decided in 1938, clearly cannot be used as evidence of Congressional intent held in 1932 when the Act was passed. Congress surely cannot be presumed in sooth-saying fashion to have looked into the future to determine the pitfalls of judicial decisions of which it must beware in framing the language of the Norris-LaGuardia Act to express its intent. The *McAllister* case simply holds that a person appointed a judge of the Federal District Court of Alaska is not a judge of a "Court of the United States" within the meaning of an exception to a Congressional statute dealing with the tenure of civil officers. The President of the United States had removed Judge McAllister prior to the end of his term. The exception contained in the statute exempted judges of courts of the United States from the tenure of office act. The Court said the Federal

District Court for Alaska was not a Court of the United States as used in the exception because the Federal Court for Alaska, being a legislative Court of the United States, was not subject to the restrictions on life tenure of judges of inferior Federal Courts contained in Article III of the Constitution. The decision in the *McAllister* case cites and relies upon *Clinton v. Englebrecht*, *Hornbuckle v. Toombs*, and *Good v. Martin* and the same reason that impelled the Supreme Court in the *Page* case to distinguish them applies equally to the *McAllister* case.

These Supreme Court decisions holding territorial Courts not Courts of the United States for the purposes of particular statutes have all relied upon and discussed the inferior status of territorial Courts in comparison with constitutional Courts, and Congress' plenary power over them.

The Court below novelly used this distinction for the purpose of elevating legislative Courts of the United States above constitutional Courts by endowing the legislative Courts with unrestricted discretion in the issuance of labor injunctions—a discretion which no constitutional Court can exercise because of the Clayton and Norris-LaGuardia Acts.

The circumstances under which Courts have drawn distinctions between constitutional and legislative Courts differ materially from and have no application, properly interpreted, to the facts presented to this Court. The reason which motivated these decisions—the intent of Congress manifested in the stat-

ute being construed—in this case compel a different conclusion. Here Congress has manifested an intent to establish a uniform public policy on the issuance of labor injunctions by courts subject to its control.

Although there is a well recognized distinction between constitutional Courts of the United States and legislative Courts of the United States, Congress, Courts and legal historians have not, as the lower Court would have us believe, universally excluded territorial Courts from the phrase “Courts of the United States.”

The Court in *United States v. Haskins*, 26 Fed. Cas. 213, sets forth a good common sense rule, relying on two Supreme Court cases, the *Englebrecht* case, supra, and *Hunt v. Palao*, 4 How. 589. Holding that territorial Courts are “Courts of the United States” as that designation is applied in section 33 of the Judiciary Act, the Court said:

The question for determination is, whether the provisions of the thirty-third section of the judiciary act, touching the arrest and removal of offenders against the United States, must be limited in their operation to cases arising in those districts which embrace a state or some portion thereof \* \* \*

It is doubtless true that the provisions of the judiciary act are, for the most part, confined in their application to courts of the United States in the sense of the constitution. \* \* \* Now the provisions of Section 33 are of universal application, and are plainly intended to cover every

offense against the United States, committed within the jurisdiction of any of its Courts.

While the district Courts of Utah are neither state Courts nor United States Courts in the sense of the constitution, they are still Courts established and organized under the authority of the United States and exercising their jurisdiction conferred upon them by that government. The whole territory is under the plenary control of the general government, and the districts, while they are territorial districts, are still districts within which certain offenses against the United States must be tried if tried at all.

It appears to me that, although the district Courts of Utah are not Courts of the United States, as defined in *Clinton v. Englebrecht*, they are in another sense not improperly styled Courts of the United States as being organized by that government under the authority to make needful regulations for the territories. They are spoken of as such in acts of Congress and in opinions of the Supreme Court. Thus in *Hunt v. Palao*, 4 How. (45 U. S.) 589, the territorial Court of Florida is spoken of as a court of the United States in contradistinction to a state court, and in *Clinton v. Englebrecht* the court speaks of these courts as acting, in cases arising under the constitution and laws of the United States, "as circuit and district courts of the United States". So far, then, as these courts have exclusive jurisdiction over crimes committed against the United States they may, it seems to me, be held to be included in the term "courts of the United States" as used in the thirty-third section of the

judiciary act. I cannot see that any sound rule of construction is violated by so doing. The act is remedial in its character, and I do not find any good ground for giving it so narrow and technical a construction as is contended for by the defendant, the practical effect of which must be to leave offenses committed in a territory where they cannot be reached or punished if the offender succeeds in escaping to some state.

Legislative Courts are Courts of the United States in the sense that they were created by Congress under authority of the Constitution. This is true whether the particular legislative court in question is the United States Court of Claims or a Territorial Court. This is uniformly recognized by all legal digesting systems. Thus 20 Federal Digest 255, Title VII, *under* Courts, is set up like this:

## VII. United States Courts

G. Supreme Court

H. Circuit Courts of Appeals

I. Circuit Courts

J. District Courts

K. Territorial and Provisional Courts

L. Courts of District of Columbia

M. Courts of Claims

As we have seen, "District Court of the United States" as used in the Clayton Act and the very phrase here construed "Court of the United States" includes the Federal District Court of the Territory which is a legislative Court.

Territorial Courts are "Courts of the United States" as that term is used in the Seventh Amendment to the Constitution. See United States Constitution, Revised and Annotated, where it is said, at page 693:

To What Courts Applicable.

This amendment applies only to courts sitting under the authority of the United States, including courts in the Territories and the District of Columbia. It does not apply to a State court even where it is enforcing a right created by Federal statute; the court in such case still derives its authority as a court from the State.

Territorial Courts are "federal" Courts. "Federal Legislative Courts", 43 Harv. L. Rev. 894.

If, as the Court below contends, the meaning of "court of the United States" is by judicial definition clearly and irrevocably Courts established under Article III of the Constitution, and if Congress had intended that past judicial interpretation to control, Congress need not have defined the term in the Norris-LaGuardia Act.

#### D. THE LEGISLATIVE DEFINITION.

The Court below finds that "a bare reading of Section 113(d) of the Norris-LaGuardia Act" shows that "in professing to amend the Judicial Code and in restoring the contemplated purpose of the Clayton Act," Congress did not intend "to go beyond the federal judicial system affected thereby and disturb the meaning established therein, of the phrases 'courts



of the United States' and 'any court of the United States' in so far as it is limited to constitutional courts under Article III''.

Section 13(d) of the Norris-LaGuardia Act provides:

When used in this Act, and for the purposes of this Act, \* \* \* The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

The Court construes this Congressional definition as accomplishing two purposes—excluding the Supreme Court of the United States and including the Courts of the District of Columbia. The Court says:

In restricting the definitive phrase "any court of the United States" by the clause "whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia," the section accomplishes two primary objectives. Both pertain to courts of the United States. One is to eliminate for the purposes of the Act the Supreme Court, whose appellate and original jurisdiction stems from the Constitution, from the Act's scope and the other to make certain that the courts of the District of Columbia, whose jurisdiction is controlled by Congress, come within it. However, there is no language contained in the section which can be reasonably interpreted or judicially construed as evincing an intention to read into the phrases "courts of the United States" and "any court of the United

States'' a status of court different from that dealt with by the related Judicial Code or destroy the identical meaning existing therein between courts of the United States and constitutional courts under Article III of the Constitution.

The Court attempts to explain away the clear and unambiguous meaning of the legislative definition by relying on the repetition of the words "court of the United States''. As the Court interprets the definition it reads: Court of the United States means "court of the United States''. The Court ignores the addition of the phrase "whose jurisdiction has been or may be conferred or defined or limited by Act of Congress''.

Although the *Mookini* case, *supra*, affords no help in the determination of legislative *intent*, because it was decided after the passage of the Act, the Supreme Court there lays down a relevant rule of construction. That case determined that the term "District Court of the United States'', as used in the Criminal Appeals rules, did not include the territorial District Court. There was direct evidence that the Supreme Court had drawn these rules with the intention of excluding Territorial District Courts, as its statutory authority to prescribe rules permitted it to do. But the Court carefully restricted its holding saying:

The term "District Courts of the United States'', as used in the rules, *without an addition expressing a wider connotation*, has its historic significance.

It is difficult to see how Congress could have more clearly expressed its intention to give the widest possible scope to the phrase "courts of the United States" than by adding the clause "whose jurisdiction has been or may be conferred, or defined or limited by Act of Congress."

**1. The definition as manifesting an intention to exclude the Supreme Court of the United States.**

As we have seen, the Court concludes that Congress framed its legislative definition of "court of the United States" partly for the purpose of excluding the Supreme Court from the scope of the Act. Thus the Court says, "In restricting the definitive phrase 'any court of the United States' by the clause 'whose jurisdiction has been or may be conferred or defined or limited by Act of Congress \* \* \*' the section accomplishes two primary objectives. Both pertain to Courts of the United States. One is to eliminate for the purposes of the Act the Supreme Court, whose appellate and original jurisdiction stems from the Constitution."

It is true that the Constitution confers original jurisdiction on the United States Supreme Court in cases affecting Ambassadors, Public Ministers and Consuls, and in which States are parties. But the Constitution itself confers on Congress the duty and authority to define the appellate jurisdiction of the Court.

Thus the Supreme Court in *United States v. Klein*, 80 U. S. 128, 147, recognizes the power of Congress to define its appellate jurisdiction:

The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish. The same instrument, in the last clause of the same article, provides that in all cases other than those of original jurisdiction, "the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

It seems to be an open question as to whether Congress can enlarge the original jurisdiction of the Supreme Court. Thus in *Ex parte Bakelite*, 279 U. S. 483, 73 L. ed. 789, the Court said:

The power of this Court to issue writs of prohibition has never been clearly *defined* by statute or by decisions.

From the foregoing it is clear that the definition of court of the United States contained in the Norris-LaGuardia Act does not *per se* exclude the Supreme Court. It is a Court of the United States, and Congress has power to define its jurisdiction. This brings it within the scope of the definition. Thus if the purpose of Congress in framing the definition was to exclude the Supreme Court, it failed to accomplish it.

The Act does not, in fact, affect the original jurisdiction of the Supreme Court to issue injunctions because it exercises no original jurisdiction in equity. This being true, the Court is attributing to Congress

an absurd Act, and the Court's presumption of a Congressional intent to exclude the Supreme Court in framing the definition of the Norris-LaGuardia Act is clearly erroneous.

2. **The definition as manifesting an intention to make certain that the Courts of the District of Columbia come within the definition.**

The Court construes the words, "including the courts of the District of Columbia" in the legislative definition as supporting its theory that Congress manifested an intention to exclude legislative Courts. It argues that under existing judicial decisions the status of District of Columbia Courts as constitutional Courts was in doubt, and therefore it was necessary to refer to them specifically. The Court goes even further and suggests that the Congress was correcting legislatively a judicial error. The Court says:

In our opinion, the nature of the spirit and reason which prompted Congress to bring by express provision the courts of the District of Columbia within the purview of "any court of the United States" essentially suggests a legislative attempt to rectify in effect an apparent error appearing in the latest decision of the Supreme Court of the United States on the status of such courts at the time the Norris-LaGuardia Act was enacted, and but for which error there would have been no necessity to define the term "court of the United States" nor greater need to expressly include the courts of the District of Columbia therein than to expressly exclude the Supreme Court of the United States therefrom, Congress by Act of March 3, 1901, 31 Stat. 1199 (D. C.

Code [1940], Tit. 11, § 305) having deemed the court of first instance of the District of Columbia to be a "court of the United States." This error lay in the unmistakable language of the Court in *Ex Parte Bakelite Corporation*, 279 U. S. 438, 73 L. ed. 789, decided three years before the Norris-LaGuardia Act was passed, that the courts of the District of Columbia are legislative rather than constitutional courts. Indeed, a comparable spirit and reason motivated the passage of the Act itself in disapproval of *Duplex Co. v. Deering*, 254 U. S. 443, which as the Court indicated in *United States v. Hutcheson*, *supra*, emasculated the Clayton Act, so Congress believed, by unduly restrictive judicial construction. It was not until after the Norris-LaGuardia Act became law that the Court in *O'Donoghue v. United States*, 289 U. S. 516, 77 L. ed. 1356, judicially corrected the error by designating the declaration in the *Bakelite* case to be sheer *obiter dictum* and holding that the courts of the District of Columbia are constitutional courts in the historic meaning under Article III of the Constitution, thereby in effect affirming the legislative correction made by Congress.

The untenableness of the Court's theory that Congress was concerned with the constitutional or legislative status of the courts of the District of Columbia and was judicially overruling an error in *Ex parte Bakelite* is apparent from an examination of the *Bakelite* case. The Supreme Court was not even considering the District of Columbia Courts. It was considering the status of the Court of Customs Appeals, and held it to be a legislative court. In de-

veloping the history of constitutional and legislative Courts, the Court referred to decisions concerning the legislative status of territorial Courts, and in passing remarked:

A like view has been taken of the status and jurisdiction of the courts provided by Congress for the District of Columbia. These courts, this Court has held, are created in virtue of the power of Congress "to exercise exclusive legislation" over the district made the seat of the government of the United States, are legislative rather than constitutional courts, and may be clothed with the authority and charged with the duty of giving advisory decisions in proceedings which are not cases or controversies within the meaning of Article III, but are merely in aid of legislative or executive action, and therefore outside the admissible jurisdiction of courts established under that article".

This obvious *obiter* is not even referred to in the lengthy headnote to the case. It is buried away on the twelfth page of a twenty-three page decision. It is doubtful that it was even digested until it achieved prominence when the Attorney General dug it out in 1938 to support the government's position on *O'Donoghue v. United States*, 289 U. S. 510. The Supreme Court branded it *obiter* and disposed of it as follows:

The government relies almost entirely upon the decision of this court in *Ex parte Bakelite Corp.*, 279 U. S. 438. In that case we held that the Court of Customs Appeals was a legislative court, not a constitutional court under Article

III of the Constitution. In the course of the opinion attention was called to the decisions in respect of the territorial courts, and it was said that a like view had been taken in respect of the status and jurisdiction of the courts provided by Congress for the District of Columbia. This observation, made incidentally, by way of illustration merely and without discussion or elaboration, was not necessary to the decision, and is not in harmony with the views expressed in the present opinion. "It is a maxim, not to be disregarded", said Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat. 264, 399, "that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated".

The Court's reliance on the obscure *obiter dicta* in the *Bakelite* case to manifest an intent by Congress to exclude legislative Courts by the use of the words "including the District of Columbia" is clearly untenable.

There is a much more reasonable explanation of the Congress' use of the words "including the courts of the District of Columbia". Congress was consider-



ing the Clayton Act which refers to "any district court of the United States or any court of the District of Columbia." (Clayton Act, *supra*, sections 21 and 23.) As we have seen, this includes the Federal District Courts for the territories and possessions which are legislative courts. The Court merely followed the precedent established in the Clayton Act in specifically referring to the District of Columbia. "Any court of the United States" as used in Section 20 of the Clayton Act, which the Norris-LaGuardia Act amends, embraces both territorial legislative Courts, District of Columbia Courts, and constitutional Federal District Courts.

Because Congress sits in the District of Columbia and is its sole legislator, specific provision for the District never escapes the attention of Congress. This is particularly so in reform legislation such as the Norris-LaGuardia Act as there is a wide divergence in sympathy and point of view between the sponsors of such legislation and the Southern Democrats who by their seniority control the District Committee and run the District.

The fact that the District is unique in status and its Courts differ in name accounts for specific reference to the District in the Norris-LaGuardia Act, the Clayton and other Acts.

To rely on the words "including the courts of the District of Columbia" in the legislative definition to manifest an intention to exclude from the Act's coverage two and one-half million people in the territories

and possessions of the United States who, like the people of the District, are subject to the plenary power of Congress, is patently absurd.

**E. SECTION 10 OF THE NORRIS-LA GUARDIA ACT.**

The Court next turns to Section 10 of the Act to determine what words "court of the United States" as used in that section mean. The Court says:

The purpose of section 10 of the Norris-LaGuardia Act (U.S.C. Tit. 29, § 110) in using the term "court of the United States" is to expedite appeals from such courts to the Circuit Court of Appeals, excluding by implication any court, such as circuit courts of the Territory, where review does not lie in that appellate court.

Section 10 of the Norris-LaGuardia Act provides:

Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the circuit court of appeals for its review. Upon the filing of such record in the circuit court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character.

The provisions of this section giving an extraordinary appeal to Circuit Courts of Appeals present

no obstacle to construing the act as applicable to circuit courts of the Territory.

It is clearly within the power of Congress to permit a direct appeal from a territorial circuit court to the Ninth Circuit Court of Appeals. However, the question of Congress' intention as to whether such a right is created would be a subject for the Courts to decide. The determination must first be made as to whether a circuit court of the Territory is a "court of the United States" within the meaning of the legislative definition, or if that is held to be ambiguous the Act as a whole.

Since under the doctrine of the *Hutcheson* case, the rights under the Act are substantive, rather than procedural, the Act would not be permitted to fail because a Court found a particular procedural provision inapplicable. A Court might find that the Supreme Court of the Territory is an intermediate court of appeals between a circuit court and the Ninth Circuit Court of Appeals. Or it might find that the appellate procedure set forth in Section 10 inapplicable or invalid so far as circuit courts of the Territory are concerned but under the provisions of Section 14 of the Act, hold the remaining provisions applicable.

We have the word of Senator Walsh of the Senate Judiciary Committee that Congress regarded this procedural appeal section as inconsequential and the substantive rights as all important:

We have endeavored in the framing of the bill to take care of the matter of appeals as best we

possibly can; but no matter what we do about it, the appeal is no relief whatever, as the thing is all ended long before the appeal can be heard either one way or the other. Either the strike prevails or it does not prevail, so *the matter of appeal is* of no particular consequence. (Cong. Rec. Vol. 75, part 5, p. 4930.)

Assuming an ambiguity in the legislative definition, a failure or defect of a procedural character in respect to appeals cannot properly be used to diminish the scope of the act and destroy substantive rights created by it.

Thus in *New Negro Alliance v. Kaufman*, 78 F. (2d) 415; 303 U. S. 552, subsequently amended 304 U. S. 542, a procedural difficulty referred to was not regarded as setting aside the substantive rights under the Act. A suit for injunction in a labor dispute was begun in the District of Columbia. The appeal went to the Court of Appeals of the District of Columbia, and subsequently to the United States Supreme Court. The Court of Appeals held that it had authority to review, although it was not a "Circuit Court of Appeals" within the express language of the Norris-LaGuardia Act. In other words, the Court held that an appeal from the Courts of the District of Columbia would be governed, not by the Norris-LaGuardia Act, but rather by the District of Columbia Code. Notwithstanding this fact, the substantive provisions of the Norris-LaGuardia Act were held to govern, and the United States Supreme Court upheld the application of the Norris-LaGuardia Act to that case.

Where an act is of a broad social character and is intended to be administered and construed liberally to effect the social objective of preventing Courts from interfering in labor disputes on the side of the employer by the issuance of labor injunctions, Courts are required to interpret the Act to accomplish its purpose, and a resort to procedural provisions to frustrate the purpose is judicial legislation of the very kind which Congress overruled in passing the Act.

The Court summarizes its construction of Congressional intent to exclude legislative Courts, including Circuit Courts of the Territory, from the coverage of the Act as follows:

The meaning, then, of a "court of the United States", drawn from every part of the Norris-LaGuardia Act as well as from its caption "An Act \* \* \* to define and limit the jurisdiction of courts sitting in equity \* \* \*," is interpreted to be any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress under Article III of the Constitution and which court is one of the first instance, sitting in an equity case involving or growing out of a labor dispute, with authority therein to issue restraining orders and injunctions reviewable in either the Circuit Court of Appeals or the United States Court of Appeals for the District of Columbia.

We have now discussed *seriatim* each of the premises relied on by the Court. For the reasons stated we believe each of these premises is untenable and the conclusion erroneous. It is apparent that the

Court's decision stands or falls on the basis of the Court's contention that Congress manifested an intention to exclude legislative Courts.

In the petition for rehearing error in the decision was alleged on the ground that the Sherman and Clayton Acts which the Norris-LaGuardia Act amends are applicable to the Territory and the provisions relating to Courts of the United States set forth therein include the Federal District Court of the Territory which is a legislative Court. The Court refused to pass on this contention but dismissed the argument with the contention that even if one legislative Court was covered by the Act that fact would support the Court's conclusion under the rule that the inclusion of one is the exclusion of the other.

The Court said:

Assuming *arguendo* without deciding that the urged construction is judicially sound, the Act's applicability under it to one legislative court specifically would constitute an exception to the Act's inapplicability under the court's interpretation to legislative courts generally. More pertinent, the construction would afford corroborative aid to such interpretation with respect to the Act's inapplicability to the second circuit court of the Territory. Clearly upon the principle of *inclusio unius est exclusio alterius* an intent to include within the jurisdictional limitations, placed by the Act upon comparable constitutional courts, the only legislative court in the Territory (the United States District Court for the District of Hawaii) which has the same federal jurisdiction, subject to the same limitations, as constitutional district courts, Congress

having declared that it "shall have the jurisdiction of district courts of the United States, and shall proceed therein in the same manner as a district court" (Or. Act § 86; 48 U.S.C.A. § 642), of itself would evidence in the absence of any manifestation to the contrary an intent to exclude therefrom the other (the second circuit court of the Territory) which has not federal but territorial jurisdiction and is not required to proceed in the same manner as a district court of the United States.

Since the Court's holding is based solely on the manifestation of an intent to include only constitutional Courts, a concession that the act applies to one legislative Court invalidates its decision.

The Court was required to pass upon the contention of counsel that the act applies to legislative Courts. If the Court found that even one legislative Court was included within the coverage of the act, its whole theory of the exclusion of legislative Courts falls, and its decision based on that theory is erroneous.

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### III.

**THE NORRIS-LaGUARDIA ACT MUST BE GIVEN THE SAME SCOPE AND COVERAGE AS THE SHERMAN AND CLAYTON ACTS WHICH IT AMENDS.**

Assignment of Error No. 6.

The Court erred in failing to give to the Norris-LaGuardia Act the same scope and coverage as the Clayton and Sherman Acts which the Norris-LaGuardia Act amended.

The Supreme Court of the United States in the *Hutcheson* case has laid down clear and well defined rules for the construction of the Norris-LaGuardia Act. The Court below did not deign to refer or discuss the portions of the Clayton Act dealing with the rights of labor, but looked only to the procedural provisions of the Clayton Act set forth in the Judicial Code. Yet the Court below cites with approval and relies on the *Hutcheson* case to establish the fact that the purpose of the Norris-LaGuardia Act was to amend the Clayton Act:

The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction.

Surely this language alone required the Court to turn to the provisions of the Clayton Act which the Norris-LaGuardia Act amended to determine the Congressional intent.

The Supreme Court does not stop with the statement of the underlying aim of the Norris-LaGuardia Act. It discusses at length throughout the entire decision the proper interpretation of Congressional intent as manifested by the Act and the rules of construction that are to be applied. The Supreme Court treats fully of the precise interrelation of the Sherman Act, the Clayton Act which amended it, and the Norris-LaGuardia Act which amended the Clayton Act. The Supreme Court describes these three Acts



as "these three interlacing statutes", and the Norris-LaGuardia Act as "one of a series of enactments touching one of the most sensitive national problems."

Justice Frankfurter after elaborating on the historic, economic and amendatory effect of these three statutes determined that it was necessary to read "the Sherman Law and Section 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of *outlawry of labor conduct*". The Attorney General in the *Hutcheson* case—which involved a criminal proceeding—contended that the Norris-LaGuardia Act applied only to injunction proceedings in Courts of equity—a narrow construction closely parallel to that on which the opinion of the lower Court rests. Justice Frankfurter speaking for the Court scathingly replied:

But to argue, as it was urged before us, that the Duplex case still governs for purposes of a criminal prosecution is to say that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison.  
 \* \* \* That is not the way to read the will of Congress, *particularly when expressed by a statute which, as we have already indicated, is practically and historically one of a series of enactments touching one of the most sensitive national problems*. Such legislation must not be read in a spirit of mutilating narrowness. On matters far less vital and far less interrelated we have had occasion to point out the importance of giving "hospitable scope to Congressional purpose even when meticulous words are lacking." *Keifer*

& *Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 391, and authorities there cited. (*Italics ours.*)

This is strong language indeed, and a reference to the *Keifer* case cited by the Court emphasizes its forcefulness and scope. In that case the Court read into an Act of Congress a right to sue a government corporation even though Congress has concededly *failed to express its will in words*. The Court said at page 389:

This is not a textual problem; for Congress has not expressed its will in words. Congress may not even have had any consciousness of intention. The Congressional will must be divined, and by a process of interpretation which, in effect, is the ascertainment of policy immanent not merely in the single statute from which flow the rights and responsibilities of Regional, but in a series of statutes utilizing corporations for governmental purposes and drawing significance from dominant contemporaneous opinion regarding the immunity of governmental agencies from suit.

Reading the holding of the *Keifer* case in context with the *Hutcheson* case where it is cited, the Supreme Court of the United States is saying that if Congress failed in any respect to put into words—or did not think to put into words—provisions necessary to carry out the clear purpose of the Norris-LaGuardia Act, Courts must nevertheless construe the Act to accomplish the purpose and public policy which Congress expressed.

Justice Frankfurter leaves no doubt that this is the mandate of construction the Court was positing for the Norris-LaGuardia Act. He continued:

The appropriate way to read legislation in a situation like the one before us, was indicated by Mr. Justice Holmes on circuit: "A statute may indicate or require as its justification a change in the policy of the law although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however, indirectly that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of the duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson v. United States*, 163 F. 30, 32.

The Court then applied the mandate to the Norris-LaGuardia Act read with the Clayton Act and the Sherman Act, stating:

The relation of the Norris-LaGuardia Act to the Clayton Act is not that of a tightly drawn amendment to a technically phrased tax provision. The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction. This was authoritatively stated by

the House Committee on the Judiciary. "The purpose of the bill is to protect the rights of labor in the same manner that Congress intended when it enacted the Clayton Act \* \* \* which act, by reason of its construction and application by Federal Courts, is ineffectual to accomplish the congressional intent." \* \* \* The Norris-LaGuardia Act was a disapproval of *Duplex Printing Press Co. v. Deering*, supra, and *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.*, 274 U. S. 37, as the authoritative interpretation of Section 20 of the Clayton Act, for Congress now placed its own meaning upon that section. The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light Section 20 removes all such allowable conduct from the taint of being a "violation of any law of the United States", including the Sherman Law.

It must be obvious in the light of the foregoing that the Norris-LaGuardia Act must be read with the Sherman and Clayton Acts to construe the Act as the Supreme Court says it must be construed.

If the Court below had construed Congressional intent as directed by the Supreme Court of the United States it would have found no justification for giving the act the narrowest scope possible and holding it inapplicable to the Territory.

The Sherman Act of 1890 (15 U.S.C. 1-33) is specifically applicable to the Territory and represents an exercise by Congress of its plenary power

to legislate for the District of Columbia and the Territories. In the Sherman Act Congress exercised the full scope of its authority. So far as states are concerned it exercised its power to control interstate commerce. But in respect to the District of Columbia and the Territories it applied the restraint of the act in and within such areas as well as between such areas and states and foreign countries (Sections 1 and 3).

Throughout the act Congress refers to "the several district Courts of the United States" and "any district Court of the United States".

There is no doubt that these references include the legislative Courts of Territories as well as constitutional district Courts.

The Supreme Court has uniformly held that in passing the Sherman Act Congress left no area of its constitutional power unoccupied; it "exercised" all the power it possessed. *United States v. Frankfort Distilleries*, 65 S. Ct. 661; *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 495. In *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, the Supreme Court held that the power exercised by Congress in the enactment of the provision of Section 3 of the Sherman Act relating to restraint of trade or commerce exclusively within the District of Columbia, was its plenary power to legislate for the district, and therefore the meaning of this provision, unlike Section 1 of the Act dealing with states, is not limited by the scope of the power to regulate commerce.

Clearly under the language of Section 3 set forth above, which is the same for territories as for the District of Columbia, the same plenary power over territories exists and was exercised in its full scope by Congress. Thus Section 3 specifically declares illegal every contract, combination, conspiracy *in any territory or between any territory and another, or between a territory and a state, or a foreign nation*. No clearer manifestation of an intention to occupy the full scope of its power could be given by Congress.

The Clayton Act of 1914 (38 Stat. 73, 15 U.S.C. 12-17, 44; 18 U.S.C. 412; 28 U.S.C. 381-383, 386-390a; 29 U.S.C. 52, 53) was passed with a twofold purpose, the first of which was to exempt labor from the vice of the Sherman Act upon the theory, expressly stated in the Clayton Act, that "The labor of a human being is not a commodity or an article of commerce", and the second of which was to limit both the employment and the manner of employment of the labor injunction and to make lawful under all laws the activity which could not be restrained. Section 6 (15 U.S.C.A. section 17) sought to accomplish the first purpose, while Section 20 (29 U.S.C.A. section 52) as supplemented by other sections was to achieve the second purpose. Only twelve of the twenty-seven sections of the Act affect labor. None of the twelve is in the Judicial Code.

Section 6 (incorporated in Title 15, Commerce & Trade) provides:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the

anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.

Section 20 (incorporated in Title 29, Labor) of the Act provides:

No restraining order or injunction shall be granted by *any court of the United States*, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between *persons* employed and persons seeking employment, involving, or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney;

And no such restraining order or injunction shall prohibit *any person or persons whether singly or in concert*, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or

persuading others by peaceful means so to do; or from attending at any place, where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to or withholding from, any person engaged in such dispute, any strike benefit or other moneys or things of value; or from peaceably assembling in a lawful manner and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; *nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.* (Italics ours.)

Significantly, Section 52 of Title 28, Labor (Section 20 of the Clayton Act quoted above) is followed by Section 53 (Section 1 of the Clayton Act) which provides "The word 'person' or 'persons' wherever used in Section 52 of this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, *the laws of any of the Territories.* \* \* \*"

It is also of great significance that the phrase "court of the United States" as used in Section 20 includes legislative district Courts of the territories and possessions. In short, the intent of Congress to exercise the full scope of its power in the Clayton Act is clear.



Now let us turn to the Norris-LaGuardia Act to see the interlocking and interrelation between the three Acts. We have already examined the manner in which that relationship has been held to operate by the Supreme Court of the United States. It surely must be conceded from the outset that there cannot exist a Sherman Anti-Trust law and a Clayton Act operating in one way in the Territory of Hawaii and in a totally different way in the rest of the United States.

Yet it is clear that this is the effect of this Court's decision since it has excluded Circuit Courts of the Territory on the theory that Congress intended to exclude legislative Courts of the United States—and that distinction necessarily means that both the Federal District Court of the Territory as well as the Circuit Courts of the Territory and the Supreme Court of the Territory are excluded from and not bound by the provisions of the Norris-LaGuardia Act since all are legislative Courts of the United States.

In short, the Court below is holding that Congress has twice failed—once in the Clayton Act and once in the amendatory Norris-LaGuardia Act to accomplish the purpose which it specifically expressed in regard to labor disputes—even though the provisions of the Sherman Act and the Clayton Act dealing with conspiracies in restraint of trade affect the Territory.

The Court below has thus, by judicial legislation, assigned, a different geographical and territorial operation to those parts of the Act affecting conspiracies

in restraint of trade and those limiting jurisdiction to issue injunctions in labor disputes and giving labor substantive rights.

Section 1 of the Norris-LaGuardia Act removes from the jurisdiction of Courts of the United States as therein defined power to issue restraining orders or temporary or permanent injunctions except in conformity with the provisions of the Act. It further provides that no "such restraining order or temporary or permanent injunctions" shall "be issued contrary to the public policy declared".

Section 2 of the Act declares the public policy of the United States and contains the mandate that the Act shall be interpreted in the light of that policy.

In substance, the declaration recognizes the helplessness of the individual unorganized worker and the consequent necessity that he "have full freedom of association, self-organization and designation of representatives of his own choosing to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization, or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection".

When this declaration of policy is considered in the framework of the social and economic conditions which existed in 1932, it surely cannot be denied that it inaugurated a wholly new concept in the law of

the land in regard to labor. It swept from the books a long series of judicial anti-labor legislation beginning with the famous *Danbury Hatters* case, *Loewe v. Lawler*, 208 U. S. 274, in 1908 and continuing through *The Bedford Co. v. Stone Cutters Assn.*, 274 U. S. 37, in 1927.

The Norris-LaGuardia Act and its public policy declaration was the opening cannon of the New Deal of Franklin Delano Roosevelt. Certainly employers howled with rage at its inauguration. The States Righters and White Supremists harangued the Congress during its passage.

Economically, the passage of the Act and the declaration of its policy fits into the picture at the end of the most catastrophic economic depression ever known to the United States made so because the purchasing power of America's millions of consumers had reached such an unprecedented low that there were no markets for production.

That working men considered the passage of the Act and the declaration of policy the dawn of a new day is clearly indicated by the sharp upswing in organization which followed the passage of the Act. The Supreme Court in the *Hutcheson* case leaves no room for doubt that this public policy must be made fully effective.

Section 3 provides that yellow-dog contracts shall thenceforth be unenforceable. This section certainly does more economically and socially than limiting the power of Courts to enforce such contracts. It makes

the contracts against public policy. Certainly to the minds of employers, it infringed rights of substance which had netted them in the preceding years of our history many millions of dollars of profits. Neither the Judicial Code nor the Clayton Act previously dealt with or affected yellow-dog contracts under which employers had for years exacted promises to refrain from joining or associating with their fellow workers as a condition to being chosen from the great mass of unemployed to work for a miserable wage.

Section 4 enumerates the specific acts which cannot be the subject of restraining orders or injunctions. As the Supreme Court says in the *Hutcheson* case, this opens up a whole new area of allowable labor conduct which cannot be limited either by Courts of equity or made the basis for criminal proceedings.

Section 5 removes from the jurisdiction of Courts the power to issue restraining orders or temporary or permanent injunctions for doing in concert the specific acts enumerated in Section 4 on the theory that such acts constitute unlawful combinations or conspiracies.

Sections 6 provides that no officer or member of any association or organization, or no association or organization participating in or interested in a labor dispute shall be held liable for the unlawful acts of individual members or agents except upon clear proof of actual participation in or authorization or ratification of such acts after actual knowledge.

Section 7 enumerates the conditions precedent to the granting of restraining orders or temporary or permanent injunctions in labor disputes.

Section 8 provides that noncompliance with obligations of collective bargaining or compliance with legal procedures, or failure to make a good faith effort to settle disputes by negotiation or arbitration shall prevent injunctive relief.

Section 9 requires Courts to make findings of fact, and to grant restraining orders or injunctions, in strict conformity with other provisions of the act, only on the basis of such findings of fact and to include prohibitions only of such specific acts as are complained of.

Section 10 provides for extraordinary and speedy review by Circuit Courts of Appeal on both the denial and granting of restraining orders and injunctions.

Section 11 provides for the speedy and public trial by jury of persons charged with contempt of restraining orders and injunctions issued in conformity with the Act.

Section 12 gives the defendant in any contempt proceedings a right to peremptorily demand the retirement of the judge if the contempt arises from an attack on the character or conduct of the judge.

Section 13 of the Act contains the legislative definitions of the terms in the statute. Since the Act applies in cases involving labor disputes the definition contained in Section 13(c) is extremely important. A

labor dispute is defined as “any controversy concerning terms or conditions of employment, or concerning the association or representation of persons negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee”. This section also defines the term “court of the United States” as used in the Act. The definition of labor disputes goes far beyond the scope given that term in the Clayton Act, *and the definition of “court of the United States” is the most comprehensive that Congress could frame without exceeding its powers.*

Section 14 provides that if the application to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of such sections and the application of such provisions to other persons or circumstances shall not thereby be affected.

Section 15 repeals all acts and parts of acts in conflict.

Surely no single section or word of this Act can be seized upon to manifest an intention to give the Act a narrower scope than the Clayton Act which applies in and to the Territory. To assign such an intention, as the Court below has done, leaves in effect in the territories and insular possessions the discarded judicial interpretations of the Clayton Act which the Supreme Court says were overruled by the Norris-LaGuardia Act, and leaves the state of the

law in the Territory in utter confusion. Thus since the Norris-LaGuardia Act does not apply to the Territory but the Clayton Act does, is the Clayton Act to be read as interpreted by the Supreme Court before its "broad purposes were restored" or does it lie dormant on the books unaffected by the restoration which took place elsewhere?

Congress in passing the Norris-LaGuardia Act was amending the Clayton Act, as the Court below concedes—but not, as the Court assumes throughout its opinion the portions contained in the Judicial Code. By passing the Act the United States Supreme Court in the *Hutcheson* case says that Congress "reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as re-defined by the latter Act", thus removing all such allowable conduct from the taint of being a "violation of any law of the United States", including the Sherman Act. The Court continued:

There is no profit in discussing those cases under the Clayton Act which were decided before the courts were furnished the light shed by the Norris-LaGuardia Act on the nature of the industrial conflict. And since the facts in the indictment (peaceful picketing) are made lawful by the Clayton Act in so far as "any law of the United States" is concerned it would be idle to consider the Sherman Law apart from the Clayton Act as interpreted by Congress. \* \* \* It was precisely in order to minimize the difficulties to which the general language of the Sherman Law in its application to workers had given rise, that Congress cut through all the tangled verbalisms and enumerated concretely the types of activities

which had become familiar incidents of union procedure.

Surely when the Sherman, Clayton and Norris-LaGuardia Acts are read together, as the United States Supreme Court directs, it becomes apparent that the proper place to look for the meaning of the words "court of the United States" as defined by the Act—if, indeed the definition can, after reading these three acts together, be held to be ambiguous—is to the Sherman and Clayton Acts both of which use the words "courts of the United States" and in both of which "courts of the United States" are used to include federal Courts of the United States in territories and insular possessions. It is also clear that in these first two in a series of three Acts that the Court exercised the full scope of its authority and directed that the provisions of the Acts apply *in* and to the territories. All rules of construction dictate that the same scope shall be attributed to the amending Norris-LaGuardia Act as is given to the Acts which it amends.

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#### IV.

**THE NORRIS-LaGUARDIA ACT IS AN EXERCISE BY CONGRESS OF ITS PLENARY POWER TO LEGISLATE FOR THE TERRITORY.**

Assignment of Error No. 7.

The Court erred in failing to construe the Norris-LaGuardia Act as an exercise by Congress of its plenary power to legislate for the Territory of Hawaii.



For the reasons set forth under Point III above, there can be no doubt that the Sherman, Clayton and Norris-LaGuardia Acts represent exercises by Congress of their plenary power to legislate for the Territory.

The Clayton and Norris-LaGuardia Acts, as interpreted by the Supreme Court in the *Hutcheson* case

1. exempt labor organizations involved in labor disputes from the anti-trust provisions of the Sherman and Clayton Acts,

2. drastically limit the power of federal Courts to issue injunctions in labor disputes,

3. specifically provide that all the labor union activity defined in the Norris-LaGuardia Act shall not be held or considered to be violations of any law of the United States.

Thus all the labor union activity specified in the Norris-LaGuardia Act is lawful in the Territory.

As we read the Norris-LaGuardia Act Congress manifested in the legislative definition and the Act as a whole a specific intention to legislate for territorial courts including Circuit Courts. This intention was manifested by going beyond the Clayton Act—where “courts of the United States” was used to mean both constitutional and legislative federal district courts—and specifically defining this phrase to mean any court for which Congress can constitutionally legislate.

But even if this construction of congressional intent is rejected, Circuit Courts, because of the exercise

by Congress of its plenary power, have no jurisdiction to restrain activity made lawful under all laws of the United States.

By the Organic Act (48 U.S.C. 519, 562) the legislative power of the Territory is limited "to all rightful subjects of legislation *not inconsistent* with the Constitution and laws of the United States." The legislative exercising power delegated by Congress could not empower Circuit Courts either by grants of general equity jurisdiction or specific statute, to restrain activity specifically made lawful under all laws of the United States.

The Court below refused to recognize the Norris-LaGuardia Act as an exercise by Congress of its plenary power to legislate for the Territory, held the Act inapplicable to Circuit Courts and refused to issue a perpetual writ of prohibition against a circuit judge who violated both the substantive and procedural provisions of the Act.

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## V.

**THE NORRIS-LA GUARDIA ACT IS NOT A NARROW PROCEDURAL ACT. IT CONFERS SUBSTANTIVE RIGHTS ON ALL PERSONS AND ORGANIZATIONS IN THE TERRITORIES AND POSSESSIONS OF THE UNITED STATES FOR WHOM CONGRESS CAN CONSTITUTIONALLY LEGISLATE.**

### Assignment of Error No. 8.

The Court erred in construing the Norris-LaGuardia Act as a narrow procedural act affecting only the jurisdiction of constitutional courts sitting in equity.

The Court below construed the Norris-LaGuardia Act as a narrow procedural act affecting only the jurisdiction of constitutional courts sitting in equity. The procedural phases of the Act are secondary in importance to the substantive rights.

The Norris-LaGuardia Act guarantees to labor the right to engage in certain clearly defined types of activity without previous restraint by injunction or fear of subsequent punishment in federal criminal courts and territorial courts. This conclusion is mandatory when the Norris-LaGuardia Act is read, as the Supreme Court has held Congress intended, in conjunction with Section 20 of the Clayton Act. The Act protects these rights of labor in two ways:

1. By the creation of substantive rights to engage in these activities free from fear of subsequent criminal prosecution under any law of the United States.

2. By the absolute prohibition against their restraint by courts of the United States sitting in equity.

“The Norris-LaGuardia Act”, the Supreme Court said in *U. S. v. Hutcheson*, 312 U. S. 219, “reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light Section 20 removes all such allowable conduct from the taint of being ‘violations of any law of the United States’, including the Sherman Law.”

What are these “immunized trade union activities”—these substantive rights guaranteed by Section 20 of the Clayton Act as amended by the Norris-LaGuar-

dia Act—which shall not be considered or held to be violations of any law of the United States?

1. The right to be free from yellow-dog contracts which are made unenforceable and void as against public policy. (29 U.S.C.A. 103.)

2. In any labor dispute, as broadly defined in the Act, to do *singly and in concert* all the acts specifically enumerated in Section 104.

If there can be any question of the conferring on labor of substantive rights by the Norris-LaGuardia Act in the light of the discussion of “immunized trade union activity” in the *Hutcheson* case, the March 10, 1947, decision of the Supreme Court of the United States in *United Brotherhood of Carpenters, et al. v. United States*, 91 L. ed. 705, answers it. In that case, the United States was prosecuting certain labor unions and trade associations for violations of the Sherman Act. The unions were subject to the Sherman Law because there was evidence that they had conspired with their employers and hence were not, under the rule laid down in *Allen Bradley v. Local Union No. 3*, 325 U. S. 805, immune from prosecution under the Sherman law. The question decided in the *Carpenters* case was that Section 6 of the Norris-LaGuardia Act—which limits the liability of officers and members of associations (labor and employer) for the unlawful acts of individuals to acts of agents where there is clear proof of actual participation in actual authorization of, or ratification of such unlawful acts after actual notice—is applicable to criminal prosecutions under the Sherman law.

It must be borne in mind that the Norris-LaGuardia Act does not refer to the Sherman law, and this holding which permits provisions of the Norris-LaGuardia Act to be invoked under the Sherman law is therefore an authoritative holding that the Norris-LaGuardia Act confers substantive rights.

The Court says in its opinion in discussing Section 6 and its applicability:

We need not determine whether Section 6 should be called a rule of evidence or one that changes the substantive law of agency. We hold that its purpose and effect was to relieve organizations, whether labor or capital and members of those organizations from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization without clear proof that the organization, or member, charged with the responsibility for the offense, actually participated, gave prior authorization, or ratified such act after actual knowledge.

The Court says it does not decide the question of whether Section 6 changes the "substantive law of agency." This reference is to the effect of the section on agency law. It is the holding that this section of the Norris-LaGuardia Act can be invoked under the Sherman Act that constitutes a holding that the Norris-LaGuardia Act gives substantive rights.

In June, 1945, in *Allen Bradley Co. v. Local Union No. 3*, supra, the Supreme Court reaffirmed its position in the *Hutcheson* case and referred to the "specified acts" declared by Section 20 (as amended by the

Norris-LaGuardia Act) not to be violations of federal law.

In *Wilson & Co. v. Birl*, 27 F. Supp. 915, 105 F. (2d) 948, the Court recognized the existence of substantive rights:

The Norris-LaGuardia Act, \* \* \* was intended to limit drastically the power of the Federal courts to issue injunctions in labor disputes. In fact, it might be said in a general way that the purpose was to put an end to it, except for a residue of jurisdiction necessary for the protection of property against destruction by violence or fraud. To accomplish the purpose of the act, Congress enumerated in § 4 various types of conduct as to which jurisdiction to enjoin was taken away. The list covered a wide field of labor conflict activities *and impliedly recognized the conduct in question as legitimate measures of offense and defense in labor disputes*. In this enumeration the act is wholly objective. It is not concerned with the purpose for which the acts are done or with the state of mind of the participants or with any question of intent, expressed or presumed. The law makes no distinction between doing the acts in question with a legal object in view and doing them with an illegal object. \* \* \* In short, it was an adoption of the philosophy of Justice Brandeis' dissenting opinion in *Duplex Printing Co. v. Deering* (1921), 254 U.S. 443, 65 L. ed. 349, 41 S. Ct. 172, 183, 16 A.L.R. 196, which condemned the point of view which made conduct actionable "when done for a purpose which a judge considered socially or economically harmful and therefore branded as malicious and unlawful."

The Supreme Court of Illinois in *Fenske Bros. v. Upholsterers' International Union*, 358 Ill. 239, in interpreting and holding constitutional the Illinois little Norris-LaGuardia Act held the act made lawful the acts courts were prohibited from restraining:

The statute does not in express terms declare the acts lawful which may not be restrained by injunctive process, but it is apparent from the context of the act that the legislative intent was to permit them to be done, otherwise it would follow that the Legislature attempted to authorize the doing of acts which it recognized were unlawful. Such a construction of the statute leads to an absurd consequence and is to be avoided. Statutes are to be interpreted according to their intent and meaning. (Citing cases.) Our conclusion is that the Legislature intended to legalize the acts mentioned in the statute.

The Supreme Court of Wisconsin interpreting the Wisconsin little Norris-LaGuardia Act—which is in form almost identical with the federal statute—in *American Furniture Co. v. International Brotherhood of Teamsters*, 268 N.W. 250, said:

The question is whether the Legislature may declare lawful acts on the part of workingmen or groups of them that in its judgment are necessary in order to balance the capacity for economic duress which past conditions have created in the employer. We discover no constitutional provision which denies this power to the Legislature. The evils which may and do flow from the natural bargaining advantage held by the employer may be recognized as calling for legislative correction

and conceivably may be met in a variety of ways. It has here been met by equalizing the bargaining power of labor and leaving the determination of wages and working conditions to the play of economic forces.

\* \* \* \* \*

When the Legislature makes peaceful picketing valid under certain prescribed circumstances, it leaves nothing for an injunction to operate upon. *The provisions of such a law are substantive in character.*

For the reasons already stated we believe it is clear that the Norris-LaGuardia Act applies to the Territory. It is clear also that the substantive rights guaranteed by the Act apply to persons in the Territory, for as we have seen the Norris-LaGuardia Act amends the Sherman and Clayton Acts which represent an exercise by Congress of its plenary power to legislate for the District of Columbia and the territories. These laws are clearly locally applicable to the Territory. The territorial legislature has no power to enact laws inconsistent with the laws of the United States. Hence even a specific criminal statute making unlawful activity described as lawful under these acts would be a nullity.

It is beyond question that Congress may change the substantive law of the United States and of the territories, and in doing so may increase or reduce the subject-matter upon which the territorial legislature may legislate. Congress may enact a statute creating a crime or repeal such a statute. If Congress does not



blanket the field, so to speak, the territorial legislature still has power to legislate so long as its enactment is not inconsistent with the federal law.

It is an elementary principle of construction that a statute will not be construed so as to result in absurdity. Innumerable absurd consequences would flow from holding the Norris-LaGuardia Act, and the provisions of substantive law contained therein, not applicable in the Territory.

1. Since Congress specifically exercised the full scope of its authority and exercised its plenary power to legislate for the Territory in the Sherman and Clayton Acts, the same scope must of necessity be given to the Norris-LaGuardia Act which amends the Clayton Act. Else it would follow that a different Clayton Act and a different Sherman Act are in force in the Territory than in the forty-eight states and the District of Columbia.

2. The Territory, its law enforcement officers, and its courts could act in flagrant disregard of the announced public policy of the United States, and could restrain and punish as crimes acts which are specifically made lawful under all laws of the United States.

3. Yellow-dog contracts made void and unenforceable by Congress could be enforced in courts of the Territory by the same token as the territorial courts could disregard all other substantive rights given under the act.

4. A public policy developed after years of struggle and agitation would be denied effectiveness and the

cancerous condition which provoked its formulation would remain in an area over which Congress concededly has authority to destroy it. It is inconceivable that Congress should have intended this result.

5. A long line of Supreme Court decisions, which Justice Brandeis described as "reminding of involuntary servitude" legislatively overruled by Congress in the Norris-LaGuardia Act as it amended Section 20 of the Clayton Act, remain binding precedents in the Territory, but obsolete elsewhere.

6. Substantive rights accruing to working men and women in the Territory by Act of Congress would be drained of all substance by territorial courts, and what is specifically lawful might even be punished as crime.

It is clear that the construction of the act by the lower court sanctions an evasion of the substantive rights guaranteed thereunder and the public policy declared therein, even though the natural meaning of the words not only does not require it but requires a totally different construction.

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## VI.

### **THE NORRIS-LaGUARDIA ACT MUST BE INTERPRETED TO EFFECT THE DECLARED PUBLIC POLICY OF THE UNITED STATES.**

The Court's decision contravenes the public policy of the United States declared in the Norris-LaGuardia Act and fails to give it a uniform application consistent with the manifest intent and direction of Congress.

It is apparent from the public policy declared in the act that Congress set out to establish a new era of labor relations in so far as it was within the power of Congress to do so. Section 2 provides:

In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

The Supreme Court in the *Hutcheson* case stated this canon of construction for the policy declaration and the Act as a whole:

A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur in the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.

The policy is clear and unambiguous. It remains only for the Courts to give it effect.

We believe that when Congress makes a declaration in strong, unequivocal language of public policy for the United States, it is reasonable to assume that Congress intended that public policy to govern every part of the United States to which Congress could constitutionally make it apply. We believe that a reading of the Act as a whole including the statement of policy and the legislative definition of "court of the United States" shows a clear intention to apply the act to the limit of the powers of Congress. To suppose that Congress felt the social policy was good for the mainland and not for the territories is implying a contradictory and fictitious intent.

The Norris-LaGuardia Act is operative in the field of labor law. It abrogated the common law and many years of judicial decisions because Congress deemed it in the interest of the general welfare to protect the rights of American workers to organize. The Court

in its opinion fails to accord proper weight to the declaration of public policy.

To determine the true meaning of the purpose and policy of the Act, it is proper—as the Supreme Court has done—to look at the causes that gave rise to the Act and statements in the Congressional debates as to what Congress expected the Act to accomplish.

Mr. Greenwood of Indiana—from the same district where the infamous *Bedford Stone Cutters* case arose—spoke with feeling of that which he knew:

This legislation is the outgrowth of historic study and experience in the matter of handling labor disputes, and I think the time has come when industry must recognize the right of labor to have unions and to deal with the members of the union collectively and bargain with them collectively so that there may be mutuality and equity on both sides of any controversy that may arise between capital and labor.

\* \* \* \* \*

They have gone far beyond the American idea of justice and equality, in denying the working man the same privileges that are given to people on the outside who do not belong to a union and who are not employed. If the Constitution means anything in the matter of freedom of speech, it should be applied just as fully to men who belong to a union, and just as fully when they are out on a strike as on any other occasion.

I say that such injunctions have reached the point where they are indefensible, and the Congress ought to undertake to define this jurisdiction in order that the constitutional rights and privileges

of men who labor and belong to unions may not be in any way infringed. (Cong. Rec. Vol. 75, part 5, pp. 5466-67.)

Senator Norris, the drafter and sponsor of the bill, spoke with equal feeling:

The hardship and the injustice brought about by the issuing of injunctions by Federal judges in labor disputes have been the subject of discussion for a number of years. The evils arising from such injunctions have been universally recognized. A public sentiment for relief through these years has gradually grown until the universal opinion of the patriotic people has crystallized into a demand for legislative relief.

Both the great political parties in their last national convention took a definite stand in favor of the passage of legislation by Congress which would give relief to the evils and the wrongs brought about by the issuing of injunctions in labor disputes. (Cong. Rec. Vol. 75, part 4, p. 4502.)

In presenting the Bill to the Senate, Senator Norris read each section and explained its purpose. He characterized Section 1, which says "no court of the United States shall have jurisdiction \* \* \*" *as a preamble to the public policy*. After reading the declaration of public policy, he said:

If the act or any part of it should be involved in any litigation where an injunction was issued or asked for, the judge before whom such action was pending would be required to give full force and effect to the public policy thus declared by the

act; and, *having in mind the public policy thus declared, he would be able to so construe the various provisions of the act as to give full effect and validity to the public policy thus declared.* (Cong. Rec., Vol. 75, part 4, p. 4503.)

Here is the mandate: The public policy is the law. The other provisions of the Act are to be construed to fully effect it. The limitations on the jurisdiction of courts is a mere preamble to the public policy. Does this, then, justify a construction which considers only the procedural aspects of the Act?

We have the authoritative word of the Supreme Court that Congress intended to so tie the hands of courts that they could not again emasculate the Clayton Act or hold trade union activity defined by the Clayton and Norris-LaGuardia Acts unlawful:

The Norris-LaGuardia Act was a disapproval of *Duplex Printing Press Co. v. Deering*, supra, and *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Association*, 274 U. S. 37 \* \* \* as the authoritative interpretation of Section 20 of the Clayton Act, for Congress now placed its own meaning upon that section.

We believe the intent of Congress to make this public policy effective over all areas for which it could constitutionally legislate is clear and unmistakable. Because of the limitations placed on Congress by the Constitution it could not affect state Courts. But by virtue of the Constitution it has plenary control over and power to legislate for Territories.

Surely no intention of Congress to permit territorial legislatures or Courts—which exercise power delegated by Congress to operate—in violation of the Act and the policy declared therein can be presumed.

Mr. LaGuardia, co-author and House Sponsor of the bill, clearly expressed the intent of Congress to act in respect to all areas over which it had power. After explaining that the bill prevented Federal Courts from being used as an agency for strike-breaking and as an employment agent for scabs to break lawful strikes, he continued:

The bill does not take one iota of jurisdiction—*because we have not the power*—from the State Courts and does not change any State law. (Cong. Rec. Vol. 75, part 5, p. 5478.)

But Congress does have power over Territorial Courts, and the public policy and legislative definition indicate that they intended to and did exercise that power.

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## VII.

**A JUDGE OF A CIRCUIT COURT OF THE TERRITORY OF HAWAII HAS NO JURISDICTION TO ISSUE A RESTRAINING ORDER IN A CASE GROWING OUT OF A LABOR DISPUTE.**

### Assignment of Error No. 10

The Court erred in holding that the defendant Cable A. Wirtz as Judge of the Circuit Court of the Second Judicial Circuit had jurisdiction to issue a temporary restraining order in a case growing out of a labor dispute.



For the reasons set forth under Points I-VI, we believe that a Circuit Court of the Territory is without jurisdiction to issue a restraining order or injunction in a case involving or growing out of a labor dispute except in strict conformity with the provisions of the Norris-LaGuardia Act, and is without jurisdiction to issue a restraining order or injunction in such a case which contravenes substantive rights guaranteed by the Norris-LaGuardia Act. This result involves no strained or twisted construction of the Act, nor even a reading into the Act of words not contained therein in order to carry out the will of Congress as it has been expressed by Congress and construed by the Supreme Court.

There is only one alternative to holding the procedural and substantive provisions of the Act binding on Circuit Courts of the Territory. That alternative is a construction that Congress intended to confer exclusive jurisdiction under the Act on the Federal District Court for the Territory of Hawaii, and that only that Court, in strict conformity with the Act, has power to issue temporary or permanent injunctions in cases involving or growing out of labor disputes in the Territory.

This result affects the public policy declared by Congress and gives full scope to the substantive and procedural sections of the Act.

As shown in Points III and IV, the Sherman and Clayton Acts by their terms apply in and to the Territory, and the obligations of enforcement and

restraints on jurisdiction are therein placed upon Federal District Courts of the United States including the Federal District Courts of the Territory. The Norris-LaGuardia Act amends the Clayton Act and therefore must also apply to the Territory unless a strained construction nullifying the express intent of Congress and contravening the decision in the *Hutcheson* case is adopted.

There can be no doubt that the words "Courts of the United States" as used in the Norris-LaGuardia Act, even without reference to the legislative definition, must be given the same scope as that phrase is given in the Clayton Act. If it be held that the legislative definition does not extend or manifest an intent to include Circuit Courts of the Territory, then it must be held that Territorial Federal District Courts have exclusive jurisdiction under the Act.

If only Federal District Courts of territories can exercise, in conformity with the Act, jurisdiction in the field of labor injunctions, then the respondent judge was without jurisdiction and the Court should have granted the perpetual writ of prohibition.

**CONCLUSION.**

**A PERPETUAL WRIT OF PROHIBITION SHOULD HAVE BEEN GRANTED AGAINST RESPONDENTS.**

**Assignment No. 1**

The Supreme Court of the Territory of Hawaii, hereinafter referred to as the "Court", erred in making and entering its Opinion and Decision on the 4th day of December, 1946, in the above-entitled court and cause.

**Assignment No. 2**

The Court erred in making and entering its judgment on the 19th day of December, 1946, in the above-entitled court and cause.

**Assignment No. 3**

The Court erred in making and entering its Opinion and Decision denying the Petition for Rehearing on the 23rd day of January, 1947, in the above-entitled court and cause.

**Assignment No. 11**

The Court erred in dissolving the temporary writ in dismissing the petition for writ of prohibition, and in denying a permanent writ of prohibition again the defendants below, appellees here.

The perpetual writ of prohibition should have been granted because the respondent judge was without jurisdiction to issue the ex parte temporary restraining order complained of either because:

1. Circuit Courts of the Territory are Courts of the United States, as defined by and within the meaning of the Norris-LaGuardia Act; or,

2. The Norris-LaGuardia Act confers substantive rights which accrue to residents of the Territory, the exercise of which cannot be restrained by Circuit Courts of the Territory; or

3. The Federal District Court of the Territory has exclusive jurisdiction to issue injunctions in labor disputes.

The existence of a labor dispute and the failure to comply with the Norris-LaGuardia Act were admitted by both respondents. The Supreme Court of the Territory was, therefore, required by law to grant a permanent writ of prohibition against respondents restraining them from proceeding in the equity cause pending before the respondent judge.

Dated: Honolulu, T. H., this 5th day of July, 1947.

GLADSTEIN, ANDERSEN, RESNER & SAWYER,  
HARRIET BOUSLOG,

MYER C. SYMONDS,

By HARRIET BOUSLOG,

GEORGE R. ANDERSEN,

*Attorneys for Appellants.*

**(Appendix Follows.)**

## **Appendix.**



## Appendix

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### SUPREME COURT OF HAWAII

#### Syllabus.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO): LOCAL 144 OF THE INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO): UNIT 1, LOCAL 144 OF THE INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO): JOSEPH KAHOLOKULA, SEICHI DOI, HARRIS YOSHIO NAGATA, BENJAMIN AWANA, FRANK MATSUI, GEORGE FERNANDEZ, ERNEST FERNANDEZ, CHARLES REVERA, JOHN DOE, MARY DOE, RICHARD DOE, ET AL. v. CABLE A. WIRTZ AS JUDGE OF THE CIRCUIT COURT OF SECOND JUDICIAL CIRCUIT OF THE TERRITORY OF HAWAII AND MAUI AGRICULTURAL COMPANY, LIMITED.

No. 2637.

#### PETITION FOR WRIT OF PROHIBITION.

ARGUED NOVEMBER 14, 1946. DECIDED DECEMBER 4, 1946.

KEMP, C. J., LE BARON, J. AND CIRCUIT JUDGE

PENCE IN PLACE OF PETERS, J., ABSENT.

The Norris-LaGuardia Act (Mar. 23, 1932, 47 Stat. 73, c. 90, §§ 1-15; U. S. C. [1940] Tit. 29, §§ 101-115) does not apply to a Circuit Court of the Territory nor is such a "Court of the United States" as defined by and within the meaning of that Act of Congress.

#### Opinion of the Court by Le Baron, J.

The petitioners filed in this court their petition for writ of prohibition to prevent the respondents from proceeding further in, except to dismiss, a certain equity case pending below in the Circuit Court of the

Second Judicial Circuit of the Territory of Hawaii. The grounds of the petition are (1) that the case involves and grows out of a labor dispute within the meaning of the Norris-LaGuardia Act of Congress (Act of March 23, 1932, 47 Stat. 73, c. 90, §§ 1-15; U. S. C. [1940] Tit. 29, §§ 101-115), (2) that the Second Circuit Court is a "Court of the United States" as defined by and within the meaning of the Act and (3) that the respondent Wirtz as judge thereof issued at the instance of the other respondent a restraining order against the petitioners which, although admittedly in conformity with the laws of the Territory, was not in strict conformity with the provisions of the Act. A temporary writ of prohibition was duly issued. The respondents answered and admitted therein the first and third ground of the petition but denied the second, alleging that the Act of Congress does not apply to Circuit Courts of the Territory of Hawaii.

The pleadings present but one question of law. Is a Circuit Court of the Territory a "Court of the United States" as defined by and within the meaning of the Norris-La Guardia Act so as to render its provisions applicable? The answer depends upon the legislative intent of Congress. Preliminary to the determination of that intent, it is proper to ascertain whether the Act is an original enactment or merely an amendatory one.

Considering the Act including its caption as a whole, it is clearly and unmistakeably not an original enactment but in the nature of an amendatory Act in the sense that it relates to the same subject matters dealt



with by a prior and existing statute. This is forcibly brought out by the Supreme Court of the United States in *United States v. Hutcheson*, 312 U. S. 219, 236, 85 L. ed. 788. In that case the Court said: "The underlying aim of the Norris-La Guardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction." (See Act of Oct. 15, 1914 [38 Stat. 730]. Also *New Negro Alliance v. Sanitary Grocery Co.*, 303 U. S. 552, 562, 82 L. ed 1012.) Consistent therewith, the Norris-La Guardia Act by its caption "An Act to Amend the Judicial Code \* \* \*" professes to be an emendation of that Code which significantly contains portions of the Clayton Act. At this juncture a brief history of the Judicial Code and its background would not be amiss.

The rudiment of the present federal judicial system of the United States originated in 1781 with the final adoption of the Articles of Confederation under which a congressional court was created, primarily for the purpose of settling boundary disputes between the then States of the Union. This Court went out of existence upon the adoption of the Constitution in 1787, which vested "the judicial Power of the United States \* \* \* in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," the Supreme Court being granted therein appellate jurisdiction generally and original jurisdiction in certain cases. (Const. Art. III, §§ 1, 2.) The federal judicial system, thus installed as an engine in

the tripartite machinery of the government of the United States by the terms of its enabling constitutional provision, consists of two classes of courts,—the Supreme Court, fixedly established as the great Court of last resort, and that undefined class of inferior Courts not even given a name by the Constitution, which Courts may be established or abolished and whose jurisdiction may be conferred or defined or enlarged or limited by Congress at will in response to the changing needs of society. (*Kline v. Burke Constr. Co.*, 260 U. S. 226, 234, 67 L. ed. 226; *Cinderella Theater Co. v. Sign Writers' Local Union*, 6 Fed. Supp. 164, 168; *United States v. Haynes*, 29 Fed. 691, 696.) These Courts are commonly referred to as federal Courts to distinguish them from territorial and state Courts. They uniformly have been designated by judicial definition to be “constitutional courts” in contradistinction to “legislative courts,” the latter created by Congress under the power granted under Article IV of the Constitution to make “all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” Within the designation of legislative Courts are admittedly the Circuit Courts of the Territory created by the Hawaiian Organic Act of Congress, section 81. (See *Mookini v. United States*, 303 U. S. 201, 82 L. ed. 748; *O'Donoghue v. United States*, 289 U. S. 516, 77 L. ed. 1356; *McAllister v. United States*, 141 U. S. 174, 35 L. ed. 693.)

On March 3, 1911, Congress adopted the present Judicial Code, which as of December 7, 1925, is em-

bodied in the "United States Code" where it occupies the first thirteen chapters of Title 28. (36 Stat. 1087 to 1169, inclusive.) It was the first successful attempt to place in codified form the numerous prior statutes of Congress affecting the federal judiciary. The Code deals primarily with the District Courts, Circuit Courts of Appeals, Court of Claims, Court of Customs and Patent Appeals and Supreme Court of the United States, devoting its first five chapters to the District Courts, its next four *seriatim* to the other Courts, the next two to certain of them as Courts of the United States and the remaining two of the thirteen chapters to general and repealing provisions affecting the Code. It deals incidentally with territorial and state courts, but only to the extent that the final decisions or judgments of their highest Courts may come within the appellate jurisdiction of the Circuit Court of Appeals and Supreme Court, respectively. The District Courts, Circuit Court of Appeals and Supreme Court, referred to in the Code as "Courts of the United States," are constitutional Courts and form one federal judicial system. Suggestive of a substantial affinity in jurisdiction and authority, the phrase "any District Court of the United States" is twice mentioned in the alternative with that of "any Court of the District of Columbia." (U. S. C. c. 10, §§ 386, 388.) The Court of Claims and Court of Customs and Patent Appeals, referred to in the Code by name only, are legislative Courts, and are not within the same federal judicial system as District Courts. Nor are their decisions or judgments reviewable in the Circuit Court of Appeals,

but in the Supreme Court and no other. (U. S. C. c. 7, § 288, c. 8, § 308.)

The only radical change made by the Judicial Code was the abolition of the Circuit Courts of the United States and the transfer *in toto* of the original jurisdiction they exercised prior to January 1, 1912, to the District Courts of the United States (36 Stat. 1167) which thereby became and now are the only federal Courts of first instance, both criminal and civil, at law and in equity. (See *Wogan Bros. v. American Sugar Refining Co.*, 215 Fed. 273.) Since its adoption other statutes and portions thereof from time to time have been added but they constitute mere continuations and where its parts relate to the same subject matter their interrelation requires that they all be considered as a whole whenever necessary to the proper interpretation of any of its parts.

The portions of the Clayton Act (Oct. 15, 1914, c. 323, §§ 17-19, 21-25, 38 Stat. 737-740), incorporated into the Judicial Code at the time the Norris-La-Guardia Act was enacted, all appear in chapter ten of the Judicial Code, constituting sections 381 to 383 and 386 to 390, inclusive, of the United States Code and all relate in subject matter to the Norris-La-Guardia Act. Some likewise relate to and immediately precede section 384 in which appears the phrase "any Court of the United States." Such phrase as therein used was held by this Court in *Kainea v. Kreuger*, 30 Haw. 860, not to apply to Circuit Courts of the Territory. Others appear under the same caption with section 378 which deals exclusively with the Supreme Court of the United States and the Dis-

trict Courts of the United States. Consonant thereto, section 371 of the United States Code, the first section of the chapter, vests in “the Courts of the United States \* \* \* exclusive of the Courts of the several states” an eight-point jurisdiction which necessarily in the light of Article III of the Constitution applies exclusively to the Supreme Court and inferior Courts constitutionally ordained thereunder. It is apparent from such close interrelation in considering the chapter as a whole, that Courts and any Court of the United States are intended to be constitutional Courts in the historical meaning thereof. Such historical meaning and that of legislative Courts being mutually exclusive of each other, the use of the phrases “Courts of the United States” and “any Court of the United States” to mean constitutional Courts necessarily excludes legislative Courts such as Circuit Courts of the Territory which are not even remotely referred to in the entire Judicial Code.

In professing to amend the Judicial Code and in restoring the contemplated purpose of the Clayton Act, did Congress intend to go beyond the federal judicial system affected thereby and disturb the meaning, established therein, of the phrases “Courts of the United States” and “any Court of the United States” in so far as it is limited to constitutional Courts under Article III? A bare reading of section 113 (d) of the Norris-LaGuardia Act as reported in Title 29 of the United States Code suffices to show that it did not. The section reads: “When used in sections 101-115 of this title, and for the purposes of such sections—  
\* \* \* The term ‘Court of the United States’ means

any Court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the Courts of the District of Columbia.” In restricting the definitive phrase “any Court of the United States” by the clause “whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the Courts of the District of Columbia,” the section accomplishes two primary objectives. Both pertain to Courts of the United States. One is to eliminate for the purposes of the Act the Supreme Court, whose appellate and original jurisdiction stems from the Constitution, from the Act’s scope and the other to make certain that the Courts of the District of Columbia, whose jurisdiction is controlled by Congress, come within it. However, there is no language contained in the section which can be reasonably interpreted or judicially construed as evincing an intention to read into the phrases “Courts of the United States” and “any Court of the United States” a status of Court different from that dealt with by the related Judicial Code or destroy the identical meaning existing therein between Courts of the United States and constitutional Courts under Article III of the Constitution.

In our opinion, the nature of the spirit and reason which prompted Congress to bring by express provision the Courts of the District of Columbia within the purview of “any Court of the United States” essentially suggests a legislative attempt to rectify in effect an apparent error appearing in the latest decision of the Supreme Court of the United States on the status

of such Courts at the time the Norris-LaGuardia Act was enacted, and but for which error there would have been no necessity to define the term "Court of the United States" nor greater need to expressly include the Courts of the District of Columbia therein than to expressly exclude the Supreme Court of the United States therefrom, Congress by Act of March 3, 1901, 31 Stat. 1199 (D. C. Code [1940], Tit. 11, § 305) having deemed the Court of first instance of the District of Columbia to be a "Court of the United States." This error lay in the unmistakeable language of the Court in *Ex Parte Bakelite Corporation*, 279 U. S. 438, 73 L. ed. 789, decided three years before the Norris-LaGuardia Act was passed, that the Courts of the District of Columbia are legislative rather than constitutional Courts. Indeed, a comparable spirit and reason motivated the passage of the Act itself in disapproval of *Duplex Co. v. Deering*, 254 U. S. 443, which as the Court indicated in *United States v. Hutcheson*, *supra*, emasculated the Clayton Act, so Congress believed, by unduly restrictive judicial construction. It was not until after the Norris-LaGuardia Act became law that the Court in *O'Donoghue v. United States*, 289 U. S. 516, 77 L. ed. 1356, judicially corrected the error by designating the declaration in the *Bakelite* case to be sheer *obiter dictum* and holding that the Courts of the District of Columbia are constitutional Courts in the historic meaning under Article III of the Constitution, thereby in effect affirming the legislative correction made by Congress.

The purpose of section 10 of the Norris-LaGuardia Act (U. S. C. Tit. 29, § 110) in using the term "Court

of the United States'' is to expedite appeals from such Court to the Circuit Court of Appeals, excluding by implication any Court, such as Circuit Courts of the Territory, where review does not lie in that Appellate Court. This section does not apply literally to the Courts of the District of Columbia because review therefrom lies in the United States Court of Appeals for the District of Columbia rather than in the Circuit Court of Appeals. However, it does so substantially. This is evidenced by the effect of the holdings of the Supreme Court of the United States that the Court of first instance in the District of Columbia (now named ''The District Court of the United States for the District of Columbia'' by Act of June 25, 1936, 49 Stat. 1921, c. 804) is in effect a District Court of the United States within the same federal judicial system and that its Appellate Court, although of different name, likewise is a Circuit Court of Appeals. (*Federal Trade Comm. v. Klesner*, 274 U. S. 145, 71 L. ed. 972; *Swift & Co. v. United States*, 276 U. S. 311, 72 L. ed. 587; *Claiborne-Annapolis Ferry v. United States*, 285 U. S. 382, 76 L. ed. 808.) There is thus no difference in substance between the two parallel sets of Courts. It is therefore reasonable to assume that Congress intended the identity as that recognized by existing judicial holdings and hence intended the section to apply to the District Court of the United States for the District of Columbia with the same force as it does to District Courts of the United States.

The meaning, then, of a ''Court of the United States,'' drawn from every part of the Norris-La-



Guardia Act as well as from its caption “An Act \* \* \* to define and limit the jurisdiction of Courts sitting in equity \* \* \*,” is interpreted to be any Court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress under Article III of the Constitution and which Court is one of first instance, sitting in an equity case involving or growing out of a labor dispute, with authority therein to issue restraining orders and injunctions reviewable in either the Circuit Court of Appeals or the United States Court of Appeals for the District of Columbia. This interpretation is reasonable and synchronizes each portion of the Act with the others so as to give effect to every sentence, clause, phrase and word thereof. At the same time it is in harmony with the Judicial Code and portions of the Clayton Act incorporated in it, to which the Norris-LaGuardia Act relates and professes to amend. This, therefore must be taken as the legislative intent of Congress, nothing inconsistent thereto appearing in the Act. Such intent is not obscure but manifest by the language employed. Hence there is no need to seek corroborative aid from the reports of the Senate and House Committees on the Judiciary in charge of the preparation of the then proposed Norris-LaGuardia Act even though they may authoritatively supply such aid.

The position of the petitioners is briefly that Congress, having the power to define and limit the jurisdiction and authority not only of inferior constitutional Courts under Article III of the Constitution but also of inferior legislative Courts under Article IV, intended to exercise that power to the fullest ex-

tent by passing the Norris-LaGuardia Act and consequently included within its scope the Circuit Courts of the Territory. The difficulty, however, is that Congress neither expressed nor implied such an intent. In the absence thereof it cannot be presumed that Congress in cases involving labor disputes intended to supersede the local law respecting the exercise by a territorial Circuit Court of its full equity jurisdiction and the taking of appeals from its orders and decrees to the Supreme Court of the Territory. (See *Inter-Island Steam Nav. Co. v. Hawaii*, 305 U. S. 306, 82 L. ed. 189.)

In support of their position, the petitioners place great reliance upon the broadness of the public policy declared by Congress in section 2 of the Act (U. S. C. Tit. 29, § 102) and the literal application to territorial Circuit Courts of the clause in section 13 (d) (U. S. C. Tit. 29, § 113 [d]), *i. e.*, “whose jurisdiction has been or may be conferred or defined or limited by Act of Congress.” But the declaration of such policy by its language, though broadly expressive of rights of labor under the Act, does not purport to extend beyond the jurisdiction and authority of “Courts of the United States,” as defined and limited by the Act itself, nor does the clause modify anything but the comparable and definitive phrase “any Court of the United States.” It is reasonable to assume that Congress used the two phrases, “Courts of the United States” and “any Court of the United States” coextensively with the scope of the Act with respect to the Courts affected thereby and advisedly in the historical meaning of constitutional Courts, contradistinguished from legislative Courts, which those phrases have concededly

acquired by legislative use and judicial interpretation. (See *McAllister v. United States*, 141 U. S. 174, 35 L. ed. 693; *O'Donoghue v. United States*, 289 U. S. 516, 77 L. ed. 1356; *Mookini v. United States*, 303 U. S. 201, 82 L. ed. 748.) Further, Congress is presumed to have been aware of and have intended to adopt such meaning, especially when it employs in the existing and related Judicial Code the same phrases of identical import to denote Courts vested with the judicial Power of the United States by Article III of the Constitution. Thus the parts relied upon by the petitioner, consonant with the Act as a whole, conclusively in themselves and in relation to the other parts reflect the intent of Congress to affect only that great class of inferior Courts established by Congress under Article III of the Constitution. For the Supreme Court of Hawaii to construe the Act otherwise so as to make it affect any Court not belonging to that class would be judicial legislation.

The Norris-LaGuardia Act having no application to the Second Circuit Court of the Territory and that Court not being a "Court of the United States" as defined by and within the meaning thereof, the petition for writ of prohibition is dismissed and the temporary writ dissolved.

*G. R. Andersen* (*H. Bouslog* with him on the brief) for petitioners.

*M. E. Winn* (*Vitousek, Pratt & Winn* on the brief) for respondent Maui Agricultural Co., Ltd.

*C. N. Tavares*, Attorney General and *D. C. Lewis*, Deputy Attorney General, for respondent C. A. Wirtz, judge Circuit Court Second Circuit.

## SUPREME COURT OF HAWAII

## Opinion of the Court.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO): LOCAL 144 OF THE INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO): UNIT 1, LOCAL 144 OF THE INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO): JOSEPH KAHOLOKULA, SEICHI DOI, HARRIS YOSHIO NAGATA, BENJAMIN AWANA, FRANK MATSUI, GEORGE FERNANDEZ, ERNEST FERNANDEZ, CHARLES REVERA, JOHN DOE, MARY DOE, RICHARD DOE, ET AL. *v.* CABLE A. WIRTZ, AS JUDGE OF THE CIRCUIT COURT OF SECOND JUDICIAL CIRCUIT OF THE TERRITORY OF HAWAII AND MAUI AGRICULTURAL COMPANY, LIMITED.

No. 2637.

## PETITION FOR REHEARING.

Submitted January 4, 1947. Decided January 23, 1947.

Kemp, C. J., Le Baron, J. and Circuit Judge  
Pence in Place of Peters, J., Absent.

*Per Curiam.* This is a petition for rehearing and reargument of the cause relative to the Court's opinion reported on page 404 *ante*. The petition is supported by a brief of fifty-five pages.

The first ground of the petition is that "the statement of the Court in its opinion that the restraining order issued by respondent Wirtz is 'admittedly in conformity with the laws of the Territory' is in error and is prejudicial to petitioners." The statement is neither erroneous nor prejudicial. It merely refers to an admission of the attorney for the petitioners made in open Court for the purposes of argument and which concerned a matter not in issue.

Bearing in mind that the Court's opinion resolved in the negative the sole issue presented, which is whether the second circuit court of the Territory is "a court of the United States" within the meaning of the Norris-LaGuardia Act, it is readily apparent from the arguments advanced to support them that the remaining grounds of the petition rest fundamentally upon a misconception of the authoritative holding of this Court and present questions heretofore fully briefed and argued at the hearing and considered by the Court. One example of such misconception is the urging by the supporting brief of the construction in relation to the amended Clayton and Sherman Acts that Congress intended the Norris-LaGuardia Act to apply to the United States District Court for the District of Hawaii. Assuming *arguendo* without deciding that the urged construction is judicially sound, the Act's applicability under it to one legislative Court specifically would constitute an exception to the Act's inapplicability under the Court's interpretation to legislative Courts generally. More pertinent, the construction would afford corroborative aid to such interpretation with respect to the Act's inapplicability to the second circuit court of the Territory. Clearly upon the principle of *inclusio unius est exclusion alterius* an intent to include within the jurisdictional limitations, placed by the Act upon comparable constitutional Courts, the only legislative Court in the Territory (the United States District Court for the District of Hawaii) which has the same federal jurisdiction, subject to the same limitations, as constitutional District Courts, Congress having

declared that it "shall have the jurisdiction of District Courts of the United States, and shall proceed therein in the same manner as a District Court" (Or. Act § 86; 48 U.S.C.A. § 642), of itself would evidence in the absence of any manifestation to the contrary an intent to exclude therefrom the other (the second circuit court of the Territory) which has not federal but territorial jurisdiction and is not required to proceed in the same manner as a District Court of the United States.

The petition for rehearing and reargument is denied without argument.

*H. Bouslog* for the petitioner.

#### NORRIS-LA GUARDIA ACT

*Section 101. Injunction prohibited except as herein provided.*—No Court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act [Chapter]; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act [Chapter].

*Section 102. Public policy of United States.*—In the interpretation of this Act [Chapter] and in determining the jurisdiction and authority of the Courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the Courts of the United States are hereby enacted.

*Section 103. Certain undertakings not enforceable by injunction.*—Any undertaking or promise, such as is described in this section, or any other undertaking or promise in section 2 of this Act [§102 of this title] is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any Court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such Court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.

*Section 104. Grounds for injunction limited.*—No Court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act [§103 of this title];



(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any Court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act [§103 of this title.]

*Section 105. Same; combinations or conspiracies.*—No Court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of

the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 4 of this Act [§104 of this title.]

*Section 106. Member of union; when not liable for acts of others.*—No officer or members of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any Court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof.

*Section 107. Hearing on sworn complaint; testimony; findings; notice; irreparable injury; period of restraint; undertaking.*—No Court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the Court, to the effect:—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained,

but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the Court shall direct, to all known persons against whom relief is sought, and also the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: Provided, however, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if

sustained, to justify the Court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the Court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the Court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the Court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

*Section 108. Person violating obligation not entitled to relief.*—No restraining order or injunctive

relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

*Section 109. Findings; specific order.*—No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the Court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the Court as provided herein.

*Section 110. Appeal to Circuit Court of Appeals.*—Whenever any Court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the Court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the Circuit Court of Appeals for its review. Upon the filing of such record in the Circuit Court of Appeals, the appeal shall be heard and the

temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character.

*Section 111.—Contempt; trial by jury; contempts in presence of Court.*—In all cases arising under this Act [Chapter] in which a person shall be charged with contempt in a Court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: Provided, That this right shall not apply to contempts committed in the presence of the Court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the Court in respect to the writs, orders, or process of the Court.

*Section 112. Same; disqualification of judge.*—The defendant in any proceeding for contempt of court may file with the Court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge and if the attack occurred elsewhere than in the presence of the Court or so near thereto as to interfere directly with the administration of justice. Upon the filing of any such demand the judge shall thereupon proceed no further, but another judge shall be designated in the same manner as is provided by law. The demand shall be filed prior to the hearing in the contempt proceeding.

*Section 113. What constitutes labor dispute; participants; Courts included.*—When used in this Act [Chapter], and for the purpose of this Act [Chapter]—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employees or associations of employees; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a “labor dispute” (as hereinafter defined) of “persons participating or interested” therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if belief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any Court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the Courts of the District of Columbia.

*Section 114. Partial invalidity.*—If any provision of this Act [Chapter] or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of the Act [Chapter] and the application of such provisions to the other persons or circumstances shall not be affected thereby.

*Section 115. Repealer.*—All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.



IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

INTERNATIONAL LONGSHORE-  
MEN'S AND WAREHOUSEMEN'S  
UNION (CIO), et al.;

*Appellants,*

vs.

CABLE A. WIRTZ, as Judge of the  
Circuit Court of the Second Judicial  
Circuit, Territory of Hawaii, and  
MAUI AGRICULTURAL COM-  
PANY, LIMITED,

*Appellees.*

*Upon Appeal from the Supreme Court of the  
Territory of Hawaii*

**ANSWERING BRIEF OF APPELLEE**  
**Maui Agricultural Company, Limited**

C. NILS TAVARES

Alexander & Baldwin Building  
Honolulu, T. H.

*Attorney for Appellee.*

*Of Counsel:*

VITOUSEK, PRATT & WINN

**FILED**

DEC 31 1947

PAUL P. O'BRIEN.

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IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

INTERNATIONAL LONGSHORE-  
MEN'S AND WAREHOUSEMEN'S  
UNION (CIO), et al.;

*Appellants,*

vs.

CABLE A. WIRTZ, as Judge of the  
Circuit Court of the Second Judicial  
Circuit, Territory of Hawaii, and  
MAUI AGRICULTURAL COM-  
PANY, LIMITED,

*Appellees.*

*Upon Appeal from the Supreme Court of the  
Territory of Hawaii*

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ANSWERING BRIEF OF APPELLEE

MAUI AGRICULTURAL COMPANY, LIMITED.

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## JURISDICTION

In amplification of the statement on pages 2-3 of Appellants' Opening Brief (which brief is hereinafter for brevity referred to as the "opening brief", or abbreviated as "Op. Br.") as to jurisdiction, it should be pointed out that the jurisdiction of the Supreme Court of the Territory of Hawaii is based on Section 81 of the Hawaiian Organic Act (31 Stat. 157, 48 USCA 631), and sections 6 and 83 of that Act (31 Stat. 142, 157, 48 USCA 496 and 635) which also continued laws of Hawaii previously in force subject to

modification by the Legislature or Congress, and Revised Laws of Hawaii 1945, sections 9604 (giving the Supreme Court of the Territory original jurisdiction in questions arising under writs of prohibition directed to circuit courts or to circuit judges) 9605 (amplifying that power), and 10270-10278 (relating to writs of prohibition), all of which are printed in the Appendix, as Appendix A.

### **STATUTES INVOLVED**

The opening brief p. 3, seems to imply that the Norris-LaGuardia Act is the only federal statute involved. While this is primarily the statute involved, the question of construction also involves other federal acts, which will be referred to in this answering brief. For brevity, the Norris-LaGuardia Act will be sometimes hereinafter referred to as the "NLGA".

### **QUESTION PRESENTED**

The question is not quite as broad as appears to be implied in the opening brief, p. 3. Actually, the only question presented in this case is:

Is a circuit court of the Territory of Hawaii a "court of the United States" as defined by and within the meaning of the Norris-LaGuardia Act, and are the provisions of that Act applicable to such a circuit court?

### **STATEMENT OF THE CASE**

The statement of the case on pages 4 to 7 of the opening brief is substantially correct, but requires amplification from the standpoint of appellees. Before issuing the temporary restraining order complained of in the petition for a perpetual writ of prohibition, the appellee, Circuit Judge Wirtz, held an ex parte hearing in which numerous affidavits were presented in evidence and testimony was adduced, which, together with the allegations of the sworn petition

for injunction, alleged and showed, among other things, that the respondents, their agents, servants and employees, and others in active concert and participation with them were congregating in mobs and as picketers at times in excess of 350 persons near or upon plantation property in the immediate vicinity of the entrances to the mill and other premises of the petitioner plantation in a disorderly and unlawful manner, and were wilfully and maliciously blocking the entrances to petitioner's premises; that they were denying to the employees of petitioner lawful entry upon its premises; that they were using boisterous, offensive, disorderly, abusive and insulting language directed at petitioner's employees and were threatening them with serious injury to their persons if they attempted to proceed to work or perform work for petitioner; that they were threatening and had committed numerous breaches of the peace; that they had gathered in large numbers around homes of petitioner's employees, using threatening and intimidating language toward them concerning the safety of their families, and had caused disturbances by undue noise and unseemly acts so as to annoy, disturb, and be offensive to others; and that they had unlawfully picketed many roads and streets throughout plantation property, stopping and intimidating persons seeking ingress on such roads and streets; all of which had obstructed ingress to and egress from petitioner's mill and other plantation premises, and intimidated petitioner's employees desiring to enter or proceed in and from said premises and prevented them from working for petitioner. (R. 25-28; 80-93).

The procedure followed by Judge Wirtz was "admittedly in conformity with the laws of the Territory". It was not in strict conformity with the provisions of the NLGA, which law was held by the territorial Supreme Court to be inapplicable. (Op. of Terr. Sup. Ct., R. 58; on rehearing, R. 77).

The statement on page 7 of the opening brief to the effect that the Supreme Court of the Territory held, among other

things "and that the provisions of the Norris-LaGuardia Act are not applicable in the Territory of Hawaii", is not correct. It is very clear from the whole opinion, as well as from the opinion on rehearing (R. 77-78) that the sole question actually decided was: "Is a Circuit Court of the Territory a 'court of the United States' as defined by and within the meaning of the Norris-LaGuardia Act so as to render its provisions applicable" "to the second circuit court of the Territory". (R. 58, 70). The importance of this inaccuracy will be developed later in this brief.

### THE ASSIGNMENTS OF ERROR

It is submitted that the only assignment of error entitled to consideration by this court, and the only one within the pleadings and record, is assignment no. 4 (R. 6) reading as follows:

Assignment No. 4. The Court erred in its conclusion that a circuit court of the Territory is not a "court of the United States" as defined by and within the meaning of the Norris-LaGuardia Act.

Assignment No. 10, (R. 7) claiming that "The Court erred in holding that the defendant Cable A. Wirtz as Judge of the Circuit Court of the Second Judicial Circuit had jurisdiction to issue a temporary restraining order in a case growing out of a labor dispute", erroneously assumes that the pleadings assail the power of a circuit judge of the Territory to issue a temporary restraining order in any case growing out of a labor dispute, whereas the pleadings only assail the exercise of the power in a manner not in compliance with the procedural requirements of the NLGA.

Assignments Nos. 1, 2, 3 and 11 (R. 5, 7) are mere general statements that the Supreme Court of the Territory erred generally in entering its opinion and decision, its judgment, and its opinion and decision denying the petition for rehearing.

Assignment No. 5 (R. 6), claiming that the lower court erred in its alleged conclusion that Congress manifested an intention to and did exclude from the coverage of the NLGA legislative courts of the United States, is immaterial, because we shall show that the only thing the court below really held ultimately was that a circuit court of the Territory was not a "court of the United States" within the meaning of the NLGA.

Assignment No. 6 (R. 6), assumes, unjustifiedly we submit, in view of the only point really decided by the court below, that the lower court failed to give to the NLGA "the same scope and coverage as the Clayton and Sherman Acts which the Norris-LaGuardia Act amends". This is not true, as this brief will demonstrate.

Likewise, assignments No. 7, 8 and 9 (R. 6), are merely objections to alleged reasons given by the lower court for its decision on the only real point in issue, and become immaterial if, as we believe is demonstrated by this brief, the lower court's decision on that sole point is correct. The reasoning used by the lower court in reaching its conclusion, while correct, in any event is immaterial.

## SUMMARY OF ARGUMENT

The decision of the Supreme Court of the Territory (R. 58-70, Rehearing denied, R. 77-78) was correct on the only point necessary to be, and actually decided, which was that a circuit court of the Territory of Hawaii is not a "court of the United States" within the meaning of the Norris-LaGuardia Act, and that therefore that Act was not applicable to such court, and the circuit court of the second circuit of the Territory had jurisdiction to proceed as it did, in granting a temporary restraining order without complying with the procedural requirements of the Norris-LaGuardia Act. The following is an outline and summary of the argument in support of this general proposition.

I. The territorial legislature and the territorial courts, as distinguished from the Federal or United States District Court for Hawaii, were given by Congress under the Hawaiian Organic Act practically the same autonomy as that of a State with respect to jurisdiction and procedure, and it would require clear and unmitakeable evidence of a contrary congressional intent in any subsequent Federal act to justify a holding restricting such autonomy .....	10
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## ARGUMENT

The decision of the Court below was correct on the only point necessary to be, and actually, decided, which was that a Circuit Court of the Territory of Hawaii is not a "Court of the United States" within the meaning of the Norris-LaGuardia Act, and that therefore that Act was not applicable to such Court, and the Circuit Court of the Second Circuit of the Territory had jurisdiction to proceed as it did, in granting a temporary restraining order without complying with the procedural requirements of the Norris-LaGuardia Act.

We shall proceed to demonstrate, both by ordinary principles of statutory construction applied to the language of the Norris-LaGuardia Act itself, and by the history of the act, that a circuit court of the Territory is not a "court of the United States" within the meaning and intent of that act.

## I.

The Territorial Legislature and the Territorial Courts as distinguished from the Federal or United States District Court for Hawaii, were given by Congress under the Hawaiian Organic Act practically the same autonomy as that of a state with respect to jurisdiction and procedure, and it would require clear and unmistakeable evidence of a contrary Congressional intent in any subsequent Federal Act to justify a holding restricting such autonomy.

The appellants contend that the 72nd Congress in restricting the jurisdiction and procedure of any "court of the United States" to issue injunctions in labor disputes intended to, and did, exercise the power, which admittedly it possessed, to limit and regulate the jurisdiction and procedure of Territorial circuit courts. As to this contention, this much may be said: If this was the intent of Congress, then it is the first and only instance since the organization of the Territory under the Hawaiian Organic Act that Congress has chosen to exercise its rights to restrict the general jurisdiction or authority of our Territorial courts, as that general jurisdiction was conferred or authorized to be conferred by the original Organic Act. To be sure, Congress has, from time to time, in an act of special application to the Territory of Hawaii, *expressly recognized* or *enlarged* that jurisdiction, as for instance: (a) when, by section 209 of the Hawaiian Homes Commission Act, as amended (48 USCA 703, as am.), Congress authorized the Commission to appoint guardians of minors "subject to the approval of the *court of proper jurisdiction*" (emphasis added); and (b) when, by section 217 of the same Act (48 USCA 711), it empowered the Commission, as to defaulting lessees, to

(1) bring an action of ejectment or other appropriate proceeding, or (2) invoke the aid of the circuit court of the Territory for the judicial circuit in which the tract... is situated. Such court may thereupon

order the lessee . . . to comply with the order of the commission. Any failure to obey the order of the court may be punished by it *as contempt thereof*. (Emphasis added.)

These instances, cited so triumphantly in the opening brief, pp. 22-3, were not only amendments or original portions of a *special act peculiarly local to the Territory*, being designed for the rehabilitation of native Hawaiians, but they actually prove that Congress in 1921 (when the original Hawaiian Homes Commission Act was passed; 42 Stat. 108, 113), and again in 1937 (when the amendment as to guardianship was passed; 50 Stat. 504-5), still recognized the *autonomous equity and probate jurisdiction* of the local Territorial circuit courts, including their *power to punish for contempts* under local *Territorial laws*, concerning which more will be said later.

Actually Congress, throughout the history of the Territory, has consistently taken particular care to leave to the Territorial legislature and the Territorial courts the question as to when and upon what evidence our courts of law and courts of equity may exercise their powers and the procedure of those courts.

# **1. History of Hawaiian Organic Act Indicates Unmistakable Congressional Intent to Grant Such Autonomy to Territorial Legislature and Courts, and Entirely Separate Jurisdiction and Procedure of Federal Court in Hawaii from that of Local Territorial Courts.**

In order to grasp the full significance of appellants' contention that Congress, by the NLGA, intended to change all this autonomy and limit both the Territorial legislature and the Territorial courts in their previously enjoyed powers with respect to local equity jurisdiction and procedure, and in order to evaluate this contention in its proper light, it is essential to understand just what those local powers were before the NLGA was enacted.

The most significant thing which strikes us at the outset is that Hawaii is unique in the history of all Territories and possessions of the United States in the *autonomy*, practically equal to that of a State, granted to it at the very outset by Congress, in every department of government. In this respect only the original thirteen colonies and Texas came into the union with more autonomy.

Because the appellants' contentions, if sustained, not only would affect the local legislative and judicial control over equity procedure, but also would reverse a forty-seven year trend of local autonomy toward the ultimate goal of complete self-government through Statehood in this Territory, we ask this court to bear with us in a rather minute recapitulation of Territorial history, of most of which we know this court is fully aware.

The Hawaiian Islands were annexed by a Joint Resolution of Congress (Res. No. 55), known as the Newlands Resolution, 30 Stat. 750, enacted July 7, 1898, which, among other things, not only uniquely recognized Hawaii's claim to its own public lands by rendering inapplicable to them the existing laws of the United States relative to public lands and guaranteeing that the revenues therefrom should forever be used for the benefit of Hawaii's people (a distinction that only the State of Texas can claim), but also continued in effect the "municipal legislation of the Hawaiian Islands", with certain minor exceptions, until Congress "shall otherwise determine", and created a commission of five persons to "recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper".

This Commission, composed of two senators and one representative, of Congress, and two local citizens of Hawaii, prepared and submitted to Congress a comprehensive printed report setting forth their findings and recommendations, including a draft of a proposed organic act for the Territory, which was finally enacted with minor amend-

ments. (See HAWAIIAN COMMISSION MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE REPORT OF THE HAWAIIAN COMMISSION, APPOINTED IN PURSUANCE OF THE "JOINT RESOLUTION TO PROVIDE FOR ANNEXING THE HAWAIIAN ISLANDS TO THE UNITED STATES", APPROVED JULY 7, 1898; TOGETHER WITH A COPY OF THE CIVIL AND PENAL LAWS OF HAWAII [Document No. 16, 55th Cong., 3d. Sess.]). This report is most significant because its recommendations as to the judiciary with the exception of the proposals to have the Territorial judges appointed by the local governor with the approval of the local senate, and to give the Federal judge life tenure, were followed by Congress in finally passing the Organic Act.

At pages 17-18 of this report the commission said (emphasis added) :

... the commission deem it proper to say that the people of Hawaii are capable of self-government, and have proven this by the establishment of the Republic of Hawaii and the adoption of *a constitution and code of laws which will compare favorably with those of any other government, and under such constitution and laws have maintained a stable government for several years worthy of a free people.* The people of those islands are more or less familiar with the institutions and laws of the United States, while the laws of the little Republic are largely taken from the laws of this country.

The bill proposed by the Commission is set forth in the report, and the portions on the judiciary appear on pages 38-40 thereof, being secs. 84-90 of the proposed bill, and disclose, with minor variations, language practically identical with the Organic Act as finally passed. The report of a sub-committee of this Commission, composed of Sen. Morgan and W. F. Frear, then Chief Justice of the Hawaiian Supreme Court, on the judiciary, is included on pages 162-4 of the Commission's report, and adopted by the Com-

mission. This particular portion of the report (which is printed in the Appendix as Appendix B) is adopted and quoted verbatim as its Report No. 305, at page 19, by the House Committee on Judiciary on H.R. 2972 (House Reports, Vol. 2, Nos. 246-486, Miscellaneous, 56th Cong., 1st Sess., 1899-1900, Sr. No. 4022), which bill was later incorporated by the House into S. 222, which was finally enacted as the Hawaiian Organic Act (see House Report No. 549 on S. 222; House Reports, Vol. 3, Nos. 487-807, Miscellaneous, 56th Cong., 1st Sess., 1899-1900, Sr. No. 4023). This Report No. 305, at page 21, then continues:

To this report may be added that the foundation of the legal system of the islands is the common law of England, and that the penal laws and practice is codified, and there are no penal offenses except those enumerated in the code. The civil law in its practice and procedure is partially codified.

*In view of the foregoing report it must be considered wise and safe to provide for the organization of the Territorial courts of the Territory of Hawaii by substantially continuing them as now existing under the Republic of Hawaii, and this has been done in the present bill. The reasons also stated in the report for the separation of Federal and Territorial jurisdiction and the creation of a new judicial district of the United States for the islands and the establishment of a district court sufficiently explain and sustain the provisions for such a court in section 87 of the bill. (Emphasis added.)*

In the debates on the bill, S. 222, which became the Organic Act, Sen. Cullom, one of the commissioners who prepared the bill and one of its chief proponents, even more emphatically pointed out that the theory and purpose of the bill was to set up *separate court systems* in Hawaii, one purely Federal, and one purely Territorial or local, *just as in a State*. Senator Morgan arguing in favor of both separation of Federal and Territorial courts and the appointment of

local judges by the overnorn of the Territory, also reiterated this view. See excerpts from or references to the views of Senators Cullom, Morgan and other members of Congress to this effect in Appendix D-1, pp. xli-xlv.

It will thus be seen that, at the very creation by Congress of the 'Territorial government, Congress wished *no part of Federal jurisdiction or procedural provisions to be applicable to the Territorial government and courts*, but wished to leave them *entirely autonomous, just as in a State*. Examining the Hawaiian Organic Act, as passed by Congress we find that these views were fully carried out as to separation of the Federal and Territorial judicial systems.

## **2. Hawaiian Organic Act Provisions Indicate Clearly Congressional Intent to Grant, and Actually Provide For, Such Autonomy and Absolute Separation of Jurisdiction and Procedure of Federal Court in Hawaii from that of Local Territorial Courts.**

Thus sec. 1 of the Organic Act (31 Stat. 141, 48 U.S.C.A. 493) defines "the laws of Hawaii" to mean the constitution and laws of the Republic of Hawaii in force at the time of the annexation, and refers to certain codifications of the civil and penal laws of Hawaii, which, as we have seen *ante*, p. 13, were printed and made a part of the report of the Hawaiian commission that drafted the Act, and which indicated the existence of a complete system of laws in a well-ordered local government.

By section 5 of the same act (31 Stat. 141, 48 U.S.C.A. 495), as later amended in 1910 (36 Stat. 443), the constitution and all laws of the United States "not locally inapplicable" were extended to Hawaii, but practically all of the general laws of the United States *relating to territories* were expressly made inapplicable to Hawaii. Thus Sections 1841-1891, and 1910 and 1912 of the U.S. Revised Statutes were made inapplicable to Hawaii. These sections included provisions relating to election of justices of the peace (§ 1856),

supreme court (§ 1864), judicial districts (§ 1865), limitations on jurisdiction of justices of the peace (§ 1867), *chancery* and common law *jurisdiction* of supreme and district courts (§ 1868), appeal and error (§ 1869), federal jurisdiction of district courts (§ 1910), power of supreme and district courts to issue writs of habeas corpus (§ 1912), and many other general provisions as to organization, personnel, etc., of territorial courts. These exemptions serve only to emphasize more fully the *complete local autonomy intended by Congress* for the territorial judicial system, as opposed to the purely Federal U. S. District Court for Hawaii hereinafter mentioned.

In reporting on the bill (S. 3360) which amended section 5 of the Organic Act in 1910 (36 Stat. 443), the Senate Committee on Pacific Islands and Puerto Rico says, among other things:

. . . The main object of the amendment is to remove the uncertainty, which has at times caused trouble, as to whether the provisions of the organic act are exclusive in regard to the general subjects to which they relate, or whether other provisions of the federal laws, upon the same general subjects, but enacted with special reference to other Territories, though in general terms, also apply to Hawaii.

It is believed both that the subjects covered by the laws excepted in this proviso are sufficiently covered by the organic act and that the excepted laws do not now, as a matter of construction, apply to Hawaii. But the uncertainty should be removed. . . . Senate Rept. No. 126, 61st Cong., 2d. Sess.

To the same effect is the report of the House Committee on Territories, in Report No. 910, same session.

In the debates on this amendment in 1910, Sen. Depew, the principal proponent of the bill, said:

It is a tribute, and a remarkable one, to the self-governing powers of the Hawaiian people that they should have been granted in the organic act *conditions*



*of self-government which have not been given to any other of our possessions or territories,*

quoting the report of the Commission which drafted the Organic Act, cited ante, p. 13. (45 Cong. Rec. 2292).

By section 6 of the Organic Act (48 U.S.C.A. 496) it was provided (emphasis added) :

That the *laws of Hawaii* not inconsistent with the Constitution or *laws of the United States* or the provisions of this Act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States.

Congress here strictly differentiated between *laws of Hawaii*, i.e. of the present Territory, and *laws of the United States*. This is of importance in considering the meaning and intent of sec. 20 of the Clayton Act (29 U.S.C.A. 52) which provides that certain exempted labor activities shall not "be considered or held to be violations of any *law of the United States*." (Emphasis added.) We will discuss this further later, post, pp. 84-90.

The Organic Act fully recognized and perpetuated the separate autonomy of the Territorial legislature and courts. Section 10 of that Act (48 U.S.C.A. 501) provided:

That all rights of action, *suits at law* and *in equity*, prosecutions . . . existing prior to the taking effect of this Act shall continue to be as effectual as if this Act had not been passed; . . . All offenses which by statute then in force were punishable as offenses against the Republic of Hawaii shall be punishable as offenses against the government of the Territory of Hawaii, unless such statute is inconsistent with this Act, or shall be repealed or changed by law . . . *all actions at law, suits in equity*, and other proceedings then pending . . . shall be carried on to final judgment and execution in the *corresponding courts of the Territory of Hawaii*. . . (Emphasis added.)

Section 11 of the Organic Act (48 U.S.C.A. 505) provides for the style of process in the "Territorial courts" to run in

the name of "The Territory of Hawaii". Section 81 of the Organic Act (48 U.S.C.A. 631) vests "*the judicial power of the Territory*" "in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish," and provides that:

... until the *legislature* shall otherwise provide, the *laws of Hawaii* heretofore in force concerning the *several courts* and their *jurisdiction and procedure* shall continue in force except as herein otherwise provided. (Emphasis added.)

Section 82 (48 U.S.C.A. 632) provides for the Supreme Court of the Territory, and section 83 (48 U.S.C.A. 635) reiterates:

That the *laws of Hawaii* relative to the judicial department, including civil and criminal procedure, except as amended by this Act, are continued in force, *subject to modification by Congress, or the legislature*. . . .

Finally, by section 55 of the Organic Act (48 U.S.C.A. 562) . Congress provided:

That the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable.

Although in the foregoing sections and certain others, such as section 84 (48 U.S.C.A. 636) , Congress (as would be natural in an organic law for the organization of a territorial government, just as it would in a constitution for a state government) laid down certain general basic restrictions on the general powers of the legislature and on the jurisdiction and procedure of territorial courts, the general pattern of the local territorial judiciary and the power of the legislature to regulate its jurisdiction and procedure remained practically intact, the same essentially as in the case of a state judiciary.

These local "laws of Hawaii" relating to the judiciary, which Congress so carefully left intact, the same practically as in the case of a state, embraced an *entire code of civil laws*, and an *entire code of penal laws* (printed as part of the Hawaiian Commission's report to Congress, as stated ante p. 13), of which only a relatively few sections were expressly repealed or amended by sections 7 (omitted from Title 48; see note to § 496) and 83 (48 U.S.C.A. 635) of the Organic Act. A brief summary of the most important of these laws is given in Appendix D-2, p. xlv-xlvi.

Congress, on the other hand, in the Organic Act, after providing for the *Territorial* courts under the heading "CHAPTER IV. THE JUDICIARY" (Sec 31 Stat. 157), obviously referring to the *Territorial* judiciary, just as in the previous titles such a "CHAPTER II. THE LEGISLATURE" (31 Stat. 144), and "CHAPTER 3. THE EXECUTIVE" (31 Stat 153) it referred to the *Territorial* legislature and *Territorial* executive, then expressly differentiated between such *Territorial* officers and *Federal* officers, by the title "CHAPTER 5. UNITED STATES OFFICERS" (31 Stat. 158), under which Congress then provided for the Delegate to Congress and various *Federal* officers, and under the subtitle "FEDERAL COURT" (31 Stat. 158), provided, in section 86 of the Organic Act (48 U.S.C.A. 641-645) for a Federal district court (See *U. S. v. Bower* (1914) 4 U.S.D.C. Haw. 466-467). That section provides, among other things:

... Said court *shall have*, in addition to the *ordinary jurisdiction of district courts of the United States*, jurisdiction of all cases cognizable in a *circuit court of the United States*, and shall *proceed therein in the same manner as a circuit court*; and said judge, district attorney, and marshal shall have and exercise in the Territory of Hawaii *all the powers conferred by the laws of the United States upon the judges, district attorneys, and marshals of district and circuit courts of the United States*. Writs of error and appeals from said district court shall be had and allowed to the circuit court of

appeals in the ninth judicial circuit in the same manner as writs of error and appeals are allowed from circuit courts to circuit courts of appeals as provided by law, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The *laws of the United States* relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. . . . (31 Stat. 158).

We shall discuss section 86 further in connection with the proper construction of the Norris-LaGuardia and Clayton Acts, but it suffices here to point out that in this section alone, Congress has differentiated between "*courts of the United States*," meaning the U. S. District court for Hawaii, and "*courts of the Territory*," which we have already discussed, just as it has differentiated between "*laws of the United States*" mentioned in section 86 and in sections 5 and 6, and "*laws of Hawaii*," meaning laws of the Territory, mentioned in sections 1, 6 and 81 of the Organic Act, hereinabove quoted (see further discussion of this point post, pp. 84-90) and, further, Congress has expressly provided that the relationship between the two kinds of courts, Federal and Territorial, shall be the *same as that between Federal courts and State courts in a State*.

**3. The Decisions of Both the Territorial and the Federal Courts Have Consistently Recognized and Given Full Effect to this Congressional Mandate and Intent to Grant Autonomy to the Local Legislature and Territorial Courts as to Jurisdiction and Procedure and to Entirely Separate the Jurisdiction and Procedure of the Federal Court in Hawaii from that of the Territorial Courts.**

This clear mandate of Congress as to the practical autonomy of the Territorial legislature and courts, has been

recognized and given effect in many ways by the Territorial courts, the Federal or United States District Court for Hawaii, and the Federal appellate courts.

Thus, it has been held that the powers of the territorial legislature are practically those of a State under the grant by section 55 of the Organic Act (31 Stat. 150, 48 U.S.C.A. 562), of legislative power extending "to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable."

By the Organic Act Congress organized for the Territory a sovereign government, having immunity from suit without its consent; such a government is itself "the fountain from which rights ordinarily flow." *Kawananakoa v. Polyblank*, (1907) 205 U.S. 349, 51 L. ed. 834.

In *Puerto Rico v. Shell Co.* (1937) 302 U.S. 253, 260-263, 82 L. ed. 235, 242-3, the court held provisions of the Puerto Rican Organic Act similar to ours to be "as broad and comprehensive as language could make it," and that the aim of such acts was to grant "full power of local self-determination, with an autonomy similar to that of the states. . . ."

See, also, *In re Craig* (1911) 20 Haw. 483, 490, *Yerian v. Territory of Hawaii* (9 Cir. 1942) 130 F. 2d 786, 788, as to *power of taxation* and *police power*.

This legislative autonomy extends to the courts. Referring to the Organic Act the United States Attorney General has said (emphasis added) :

Indeed, it would be difficult to frame language more clearly subjecting to legislative change *the whole matter* of "the *laws of Hawaii* heretofore in force *concerning courts and their jurisdiction and procedure*" and "relative to the judicial department." . . .

23 Ops. Attys. Gen. U.S. 539, 543.

Likewise, it has been held that the *jurisdiction and powers of Territorial courts are practically those of a State court*,

that the relationship between the Territorial courts on the one hand and the Federal including the U. S. District Court in Hawaii, is substantially the same as that between State courts and Federal courts in a State, and that in these respects the purely Territorial judicial system was unique in the history of Territories. See *Hind v. Wilder's S.S. Co.* (1900) 13 Haw. 174, 182; *Wilder's S.S. Co. v. Hind* (9 Cir. 1901) 108 F. 113, 114-116; *U. S. v. Bower* (1914) 4 U.S.D.C. Haw. 466, 467.

For decisions holding that the Federal rule against interference by habeas corpus in Federal courts with the proceedings of State courts is equally applicable to the Territory, see, also:

*In re Curran* (1916) 4 U.S.D.C. Haw 730, 738-9  
*Soga v. Jarrett* (1910) 3 U.S.D.C. Haw 502, 506-509  
*In re Atcherley* (1909) 3 U.S.D.C. Haw. 404, 421  
*In re Marshall* (1900) 1 U.S.D.C. Haw. 34

See also *Yeung v. Territory of Hawaii* (9 Cir., 1942) 132 F. 2d. 374, 378 as to the complete separation of Territorial and Federal courts.

Furthermore, the Federal appellate courts, have particularly with respect to a Territory having a dual system of courts (Territorial and Federal) like Hawaii's, emphatically adopted the rule that the decisions of such Territorial courts on matters of local law or local concern are generally controlling on the Federal appellate courts.

*Waialua Agricultural Co. v. Christian*  
 (1938) 305 U. S. 91, 106-109,  
 83 L. ed. 60, 70-72.

On the other hand, this court has very recently had occasion to emphasize the difference between the judicial system of Alaska, which still has but one set of courts with both Federal and local jurisdiction, and that of a Territory like Hawaii which has entirely separate systems, again empha-

sizing the autonomy of the Hawaii Territorial courts. Thus, in *Carscadden v. Territory of Alaska* (9 Cir., 1939) 105 F. 2d. 377, it was held that in reviewing decisions of the District Court of Alaska the Circuit Court of Appeals exercises independent judgment with respect to general, local and federal questions and review of the decision of such a court on general or local law is not limited to cases of manifest error, distinguishing the *Waialua* case, *supra*, and other similar cases.

In the face of this overwhelming evidence of the *consistent intent of Congress*, during the forty-seven years of this Territory's existence, expressed unmistakeably in the Hawaiian Organic Act, irrefutably corroborated by the history of that legislation, and consistently followed by the courts both Territorial and Federal, to grant to the Territorial legislature and Territorial courts the autonomous control over jurisdiction and procedure exercised by State legislatures and State courts, appellants ask this court to *imply*, from an expression of general policy in a statute (the NLGA) whose operative terms are obviously aimed at and fit only the purely Federal courts (as we shall hereafter demonstrate), a contrary intent to overturn the policies of half a century and by *implication* to amend the local laws of the Territory, hereinabove mentioned, relating to the jurisdiction and procedure of the Territorial courts both of law and of equity.

## II.

To hold that the Norris-LaGuardia Act has reversed the policy of local autonomy for Territorial Courts as to jurisdiction and procedure, and entire separation of Federal from Territorial jurisdiction and procedure, consistently pursued by Congress for almost half a century would require clear and unmistakeable evidence of intent so to do in such act.

That Congress itself<sup>\*</sup> has customarily recognized this rule has been clearly pointed out by the Supreme Court:

*It has generally been customary for Congress, in extending legislation to the territories and "possessions" of the United States, to expressly mention them as included within the purview of the act. . . .*

*Munoz v. Porto Rico Ry. Light & Power Co.*  
(1 Cir. 1936) 83 F. 2d. 262, 266 (Cert. den.  
80 L. ed. 1408, 298 U. S. 689).

The very nature and purpose of a territorial government call for the strict application of such a rule against implied amendment or repeal of local law, both statutory and non-statutory, of a territory. The theory upon which territories have been organized "has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority, and with certain fundamental principles established by Congress"; these powers are "apparently as plenary as" those "of the legislature of a State", the grants, such as those under sec. 55 of our Organic Act, being "as broad and comprehensive as language could make it"; and "Nothing is expressed in these acts or . . . in any other federal act which suggests a congressional intent to limit the exercise of the power of local legislation to those subjects in respect of which there is an absence of explicit legislation by Congress"; and there is "nothing in the nature of the power or in the consequences likely to ensue from the duplicate exercise of it which requires an implication to that effect." *Puerto Rico v. Shell Co.* (1937) 302 U. S. 253, 260-263, 82 L. ed. 235, 242-3.

. . . "an intention to supersede the local law (of a Territory) is not to be presumed, unless clearly expressed."

*Inter-Island Steam Navigation Company v. Hawaii*  
(1938) 305 U. S. 306, 312, 83 L. ed. 189, 194.

"A law is not to be construed as impliedly repealing a prior law unless no other reasonable construction can



be applied." United States v. Jackson, 302 U. S. 628, 631. . . . 82 L. Ed. 488.

Quoted in *Yeung v. Territory*,  
(9 Cir., 1942) 132 F. 2d. 374, 378.

This rule was quoted in the last mentioned case in connection with a holding that numerous amendments of the Hawaiian Organic Act as to appeals had not amended by implication the provisions of section 86 as to removal, etc., between Territorial Circuit Courts and the U. S. District Court for Hawaii.

In this connection, it should be noted that under section 5 of the Hawaiian Organic Act which provides that:

" . . . all the laws of the United States . . . which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States,"

the NLGA is to have, in the Territory of Hawaii, the same force and effect *as elsewhere in the United States*, that is to say, Section 5 itself provides that a federal law is *not* to have a *greater effect* in the Territory of Hawaii than elsewhere in the United States, unless specifically provided in the law itself, which is but another way of stating the rule that repeals of local laws by implication are not favored.

Appellants themselves recognize the force of this rule against implied amendment or repeal of *local* law, for they seek to avoid the rule by contending that their construction of the NLGA would not effect any change in the local law. See statement (Op. Br. 33) reading:

There is no statute in the Territory relating to the jurisdiction of Circuit Courts sitting in equity in cases involving or growing out of labor disputes. If, prior to the passage of the Act, Circuit Courts of the Territory had any power to issue injunctions in labor disputes, such power existed only by virtue of Section 81 of the Organic Act, 48 U.S.C. 631, and Sections 12401 and 12402 conferring a general power of equity on Circuit

Courts. There is no *conflict between a territorial act regulating the issuance of injunctions in labor disputes and the Norris-LaGuardia Act*. Hence, clearly within the rule laid down in the *Page* case no local law is being displaced or superseded. (Emphasis added.)

This statement ignores self-evident facts. There are numerous sections, both of the Organic Act and of the Territorial statutes which, by their general application to local equity courts and their jurisdiction and procedure, apply to injunctions in labor disputes. The more important of these sections are compiled and discussed in Appendix D-3, pp. xlvii-l, and the local statutory sections so referred to are quoted in Appendix A, pp. i-xvi.

... Before it may be said that a law passed by the territorial legislature is inconsistent with a law of the United States, it must appear that there exists a "substantial conflict between the pertinent provisions of the two statutes." *Puerto Rico v. Shell Co.*, 302 U. S. 253, 263.

*Auto Rental Co. v. Lee*  
(1939) 35 Haw. 77, 85.

The truth is that the NLGA does not impliedly amend or repeal the territorial laws above mentioned, because it applies or is pertinent to an *entirely different area of legislation*—the Federal courts—from that of such local laws, which is the territorial courts, and for *that reason* there is no conflict between them as hereinafter demonstrated.

### III.

The Norris-LaGuardia Act contains no indication of a Congressional intent to overthrow the local autonomy heretofore given by the Organic Act to the Territorial legislature and Territorial Circuit Courts over their equity or other jurisdiction and procedure or to destroy the separation of Federal and Territorial judicial jurisdiction and

procedure heretofore maintained. On the contrary, both the act and its history give every indication that Circuit Courts were not intended to be included.

Let us examine the Norris-LaGuardia Act for evidence, if any, of that *clear expression* of intent necessary to accomplish the superseding of local law contended for by appellants.

### 1. The Norris-LaGuardia Act is Expressly Limited in Its Operation to Courts of the United States.

The Norris-LaGuardia Act (Act of Mar. 23, 1932, 47 Stat. 70, 29 U.S.C.A. §§ 101-115, quoted in Appendix of Op. Br., pp. xvi-xxvi) places certain limitations on the right of any "court of the United States" to issue injunctions in labor disputes, and by section 13 (d) thereof (29 U.S.C.A. 113 (d) ), defines "court of the United States" as follows:

(d) The term "court of the United States" means any *court of the United States* whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, *including the courts of the District of Columbia*. (Emphasis added.)

If the italicized portion of the definition had been omitted and the definition had read:

The term "court of the United States" means any court whose jurisdiction has been or may be conferred or defined or limited by Act of Congress,"

it would include all Territorial courts, whether Federal or purely local like our circuit courts, as Congress admittedly has the power to confer, define and limit the jurisdiction of all Territorial courts. But the italicized words were not omitted. They were inserted for a purpose. They can not be ignored, or read out of the act. More will be said on this item later in this brief.

There are other indications in the act itself besides its title (discussed post, pp. 44-47), which show that purely Federal courts, as distinguished from territorial courts with purely local jurisdiction like our circuit courts, were the only ones intended to be affected by that statute.

Thus section 1 of the Act (29 U.S.C.A. 101) provides that

No *Court of the United States, as herein defined*, shall have jurisdiction to issue any restraining order . . . except in a strict conformity with this Act; nor shall any *such restraining order* . . . be issued contrary to the public policy declared in this Act. (Emphasis added.)

Thus, any reference in the act to a "court of the United States" is limited to such a court as defined in the act. And, the restraining order, etc., which is forbidden to be issued except in conformity with that act is "*such restraining order*"—that is, a restraining order issued by a court of the United States as defined in the act.

Section 2 of the act (29 U.S.C.A. 102) defines the public policy of the United States "In the interpretation of this Act *and in determining the jurisdiction and authority of the courts of the United States*," and, ends up by saying:

. . . *therefore*, the following definitions of, and limitations upon, the jurisdiction and authority of the *courts of the United States* are hereby enacted. (Emphasis added.)

Here again, it is clear that the act is aimed at limiting the jurisdiction and authority of the *courts of the United States*, as the means of accomplishing the declared public policy.

Similarly, section 3 of the act (29 U.S.C.A. 103) declares yellow dog contracts to be contrary to the public policy of the United States, and, as the sole medium of giving effect to that policy, again provides that such contracts "shall not be enforceable in any *court of the United States* and shall

not afford any basis for the granting of legal or equitable relief *by any such court.*" (Emphasis added.)

Likewise, throughout the entire act, all restrictions or limitations on jurisdiction are tied to proceedings in a "*court of the United States*," indicating that, whatever the motive and objective of Congress might be, the act is still essentially a procedural one, applicable to the purely Federal courts.

This follows from the fact that the term "*court of the United States*" had a *well defined meaning* prior to the passage of the NLGA, which excluded territorial circuit courts, and under such circumstances the 72nd Congress would be *presumed to have adopted that meaning* when it used the phrase. 59 C. J. 1008-1012, § 600; 11 Ency. of U. S. Sup. Ct. Repts., pp. 137-138, "*Judicial Construction.*"

See, also, *Munoz v. Porto Rico Ry. Light & Power Co.*, (1936) 83 F. 2d. 262, 266, holding that:

"In adopting the language used in an earlier act Congress must be considered to have adopted also the construction given by this Court to such language and made a part of the enactment." *Hecht v. Malley*, 265 U. S. 144 . . . "It is a well settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body." *Kepner v. United States*, 195 U. S. 100. . . .

## **2. The Term "Court of the United States" Had a Well Defined Meaning Prior to Passage of the Norris-LaGuardia Act.**

Section 1 of Article III of the Constitution of the United States provides that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

Section 2 of the same article defines the jurisdiction of such courts but does not allocate the jurisdiction to any particular court, save in one particular, that being in the case of the Supreme Court.

The section provides that:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.

Congress can not, of course, by legislation limit this jurisdiction or in any way affect it. For example Congress could not, even had it so desired, make the Norris-LaGuardia Act applicable to a case in the United States Supreme Court wherein a State applied for an injunction in a labor dispute.

Pursuant to the power and authority granted to it by Article III Congress has created certain inferior courts, they being, the Circuit Court of Appeals, the Circuit Court (later abolished) and the District Court. These courts, along with the Supreme Court are known as "Courts of the United States." Sometimes they are referred to as "constitutional courts" to distinguish them from "legislative courts" which, although created by Congress, were not brought into being by virtue of the authority granted to Congress under Article III of the Constitution. "Legislative courts" which is the class of courts to which our territorial courts belong, are not "courts of the United States." They are created by virtue of the general right of sovereignty which exists in the Government, or by virtue of that clause of the Constitution which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States.

The distinction between "courts of the United States" and "legislative courts" is brought out in the case of *McAllister v. United States* (1891) 141 U. S. 174, 179, 184, 35 L. ed. 693, 694-695, 696 decided by the United States Supreme Court in 1891, which collects the pertinent cases.

The case involved an appeal from a judgment of the Court of Claims dismissing a petition to recover a sum alleged to be due the petitioner for salary as District Judge for the District of Alaska. The President, during a Senate recess, had suspended the petitioner from his office and appointed one Dawson as his successor. Section 1768 of the U. S. Revised Statutes provided as follows:

During any recess of the Senate, the President is authorized, in his discretion, to suspend any civil officer appointed by and with the advice and consent of the Senate, *except judges of the courts of the United States*. (Emphasis added.)

The petitioner contended that he was a judge of a Court of the United States. The court held that he was not. It pointed out that the District Court of Alaska was created by Act of Congress to have and exercise the civil and criminal jurisdiction of District Courts of the United States, the judge to be appointed by the President with the advice and consent of the Senate. The court (141 U. S. 179, 35 L. ed. 694-5) said (emphasis added) :

But is the court, thus established for Alaska, one of the "*courts of the United States*" within the meaning of section 1768 of the Revised Statutes?

The Court reviewed the various cases, holding that Territorial Courts are not Courts of the United States, and said:

These cases close all discussion here as to whether territorial courts are of the class defined in the third article of the Constitution. It must be regarded as settled that *courts in the Territories*, created under the plenary municipal authority that Congress possesses over the Territories of the United States, are *not courts of the United States*.

For the reasons we have stated it must be assumed that the words "judges of the courts of the United States" in section 1768 were used with reference to the

*recognized distinction between courts of the United States and merely territorial or legislative courts.* 141 U. S. 184, 35 L. ed. 696.\*

In *Dill v. Ebey* (1913) 229 U. S. 199, 57 L. ed. 1148, the Court held that the U. S. District Court for the Western District of the Oklahoma Indian Territory was not a court of the United States within the meaning of the United States Rev. Statutes, sec. 723 providing that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law".

Coming closer to home we have the Supreme Court of the Territory in *Kainea v. Kreuger* (1929) 30 Haw. 860 holding (quoting from the syllabus, p. 861) :

A territorial court of Hawaii is not a "court of the United States" within the purview of United States Judicial Code, section 267 (title 28, Sec. 384, U.S.C.A.) which provides that "suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law".

In *Mookini v. United States* (1938) 303 U. S. 201, 82 L. ed. 748, it was held that the United States District Court for the Territory of Hawaii was not a "District Court of the United States" within the meaning of the Criminal

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\* 1. Among the cases in point which are reviewed (or quoted) in the *McAllister* case *supra*, and which are so well covered by the discussion therein as to render unnecessary further quotations therefrom by us are: *American Ins. Co. v. 356 Bales of Cotton* (1828) 26 U. S. 1 Pet. 511, 546, 7 L. ed. 242, 256; *Benner v. Porter* (1850) 50 U. S. 9 How. 235, 242, 243, 13 L. ed. 119, 123; *Clinton v. Englebrecht* (1872) 80 U. S. 13 Wall. 434, 447, 20 L. ed. 659, 662; *Hornbuckle v. Toombs* (1874) 85 U. S. 18 Wall. 648, 655, 21 L. ed. 966, 967; *Good v. Martin* (1877) 95 U. S. 90, 98, 24 L. ed. 341, 344; *Reynolds v. United States* (1879) 98 U. S. 145, 154, 25 L. ed. 244, 246; *The City of Panama* (1880) 101 U. S. 453, 460, 25 L. ed. 1061, 1064. *Page v. Burnstine* (1881) 102 U. S. 664, 26 L. ed. 268, cited in the opening brief p. 32, is also distinguished in the *McAllister* case (see discussion of the *Page* case *infra*, p. 40).



Appeal Rules promulgated by the U. S. Supreme Court on May 7, 1934 (Rule III., 292 U. S. 662, 663, 78 L. ed. 1513) which by their terms were limited to proceedings "in criminal cases in District Courts of the United States and in the Supreme Court of the District of Columbia, and in all subsequent proceedings in such cases in the United States Circuit Court of Appeals, in the Court of Appeals of the District of Columbia and in the Supreme Court of the United States", such rules having been promulgated pursuant to the Act of March 8, 1934, amending the Act of February 24, 1933, 28 U.S.C.A. sec. 723a, authorizing the U. S. Supreme Court to prescribe rules in criminal cases "in District Courts of the United States, *including the District Courts of . . . Hawaii*".

A long list of authorities including the *McAllister* case is cited in support of the conclusion reached. If it be true that the *Federal* District Court of Hawaii is not a "District Court of the United States" how can it be argued with any degree of plausibility that the Circuit Court of the Second Judicial Circuit of the Territory of Hawaii is a "court of the United States" within the meaning of the Norris-LaGuardia Act?

In *Young v. U. S.*, (C.C., W.D. Okla. 1910), 176 F. 612, the court said:

. . . It was long ago settled that the *territorial* courts are *not federal courts*, and that the procedure obtaining in them is that prescribed by the territorial Legislature. *Clinton v. Englebrecht*, 13 Wall. 434, 20 L. Ed. 659; . . . (Citing other cases; emphasis added.)

Since the passage of the NLGA there have been a number of cases upholding its constitutionality. In these cases the courts to which the Act applies are constantly referred to as "Federal courts". For instance, see *Cinderella Theater Co., Inc., v. Sign Writers' Local Union No. 591* (D. C., E. D. Mich., 1934) 6 Fed. Supp. 164, 168; and *Grace Co. v. Williams* (8 Cir. 1938) 96 F. 2d. 478, 481.

In the majority opinion written by Mr. Chief Justice Vinson in the *Lewis* case (*U.S. v. United Mine Workers of America* (Mar. 6, 1947) 330 U.S. Adv. Shts. 258, 270-271, 91 L. ed., Adv Shts., 595, 602-3, it was said:

Moreover, it seems never to have been suggested that the proscription on injunctions found in the Clayton Act is in any respect broader than that in the Norris-LaGuardia Act. . . . This Court, on the contrary, has stated that the Norris-LaGuardia Act "*still further . . . (narrowed) the circumstances under which the federal courts could grant injunctions in labor disputes*". . . .

By the Norris-LaGuardia Act, Congress *divested the federal courts* of jurisdiction to issue injunctions in a specified class of cases. . . . (Citing the *Hutcheson* case; emphasis added.)

The scope of the Clayton Act, which has always been understood to be limited to the purely Federal courts is discussed post, pp. 47-49.

Mr. Justice Frankfurter also said, in the *Lewis* case:

. . . The Norris-LaGuardia Act deprived the *federal courts* of jurisdiction to issue injunctions in labor disputes except under conditions not here relevant. (Id. p. 624).

### **3. Appellants' Arguments and Authorities Do Not Establish Their Contention That "Court of the United States" Includes Both the U. S. District Court and Territorial Circuit Courts of Hawaii.**

The argument on pages 16-23 of the Opening Brief begs the question by ignoring the well-defined term "*court of the United States*" which is an essential part of the definition in sec. 13 (d) of the NLGA, and construing it as though it read:

"*any court* whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, etc., as pointed out ante, p. 27.

The statement, p. 19 of that brief, to the effect that in the interval between annexation and enactment of the Organic Act the courts of the Territory were courts of the United States, is not supported by any authority, and appears to be at least impliedly refuted by *In re Ah Ho* (1899) 11 Haw. 654.

Practically the entire argument of the Opening Brief constitutes nothing more than setting up a straw man—the contention that the lower court based its decision on a finding that *no* legislative court was covered by the act—and then knocking it down by saying in effect “we can show that *one* legislative court is covered, therefore, the court’s decision (which did not require it to go that far) is wrong.” (See, esp. Op. Br. 55). The argument, except Point I (Op. Br. 16-23) is based upon a false premise, namely, that the Territorial Supreme Court held that the United States District Courts for the Territories, including that for Hawaii were not subject to the Norris-LaGuardia Act. Actually, as pointed out ante, p. 2, the only point decided was that a circuit court of the Territory was not a “court of the United States” within the meaning of the Norris-LaGuardia Act, and an examination of both the opinion and the ruling on motion for rehearing (R. 58, 70, 77-78) will disclose that the lower court put its decision on the sound ground that, from the language of the definition, taken in its well-defined and understood sense, and the context and legislative history of the act, no intent was disclosed to include territorial circuit courts, but rather the intent was to include the purely Federal courts.

Of course, even if Congress intended to include within the term “court of the United States” a legislative federal court, that would not signify that Congress intended to include a legislative court of non-federal jurisdiction, namely, a circuit court of the Territory of Hawaii. Moreover, as shown post, pp. 37-40, 66-67, the applicability of the NLGA provisions to the United States District Court of Hawaii does

not necessarily depend upon the question whether the term "court of the United States" is or is not confined to constitutional courts. That term may very well be confined to constitutional courts as reasoned by the Territorial supreme court, and yet the provisions governing constitutional courts may also be applicable to a legislative federal court through adoption by another act—in our case section 86 of the Hawaiian Organic Act, the congressional provision which adopts for the purposes of the legislative federal court in Hawaii the legislative provisions governing constitutional federal courts.

Appellants contend (Op. Br. 24) that the act is unambiguous, and requires no examination into the usual aids to statutory construction when the meaning is not clear. Yet in the very decision upon which they hang their main argument as to the necessity for reading the act in connection with the Clayton and Sherman Acts (to which the NLGA does not refer) — the *Hutcheson* case (1941) (312 U. S. 219, 229, 236, 85 L. ed. 788, 791, 795) — *Mr. Justice Frankfurter* refers to such aids, namely, the history of the legislation.

On page 36 of the opening brief occurs the statement that the lower court used the "distinction" of the inferior status of territorial courts "for the purpose of elevating legislative Courts of the United States above constitutional Courts" in their power to issue labor injunctions. What the lower court really did was to recognize (1) the clearly expressed purpose of Congress to leave the control over such local jurisdiction and procedure to the local legislature, and (2) that in a system such as ours, where Federal and Territorial Courts have been strictly separated as to jurisdiction and procedure, the situation is exactly the same as in a State. Such special treatment of Territorial courts in territories having a dual system, even in Territories not having such a dual court system, has been upheld time and again by the Federal courts:

Thus, in *Yeung v. Territory of Hawaii*, ante, 132 F. 2d. 374 at p. 378, this court said, quoting from an earlier decision in *Wilder's S.S. Co. v. Hind* (9 Cir.) 108 F. 113, 115-116:

. . . The system of courts created by the act for the territory of Hawaii *differs radically from the system of courts which congress had theretofore created for any of the territories.* . . . (Emphasis added.)

See, also, decisions ante, pp. 20-23, showing the *unique nature* of the territorial courts Congress established for Hawaii. There was and is, therefore, *every reason* for the lower court to differentiate these purely local territorial courts for Hawaii from the general run of Federal courts evidently contemplated by the NLGA.

In this connection see *Hind v. Wilder's S.S. Co.*, ante, 13 Haw. 174, 181-182 holding that a construction of the Organic Act making the decisions of the Territorial Supreme Court final in most cases would not be strange since "*in that respect the residents of the territories are only placed on an equal footing with the citizens of the several states.*" (Emphasis added.)

See also *Aztec Mining Co. v. Ripley* (1892) 53 F. 7, affirmed (1893) 151 U. S. 79, 38 L. ed. 80; *Folsom v. U. S.* (1895) 160 U. S. 121, 127, 40 L. ed. 363, 365.

The inapplicability of the NLGA to circuit courts of this Territory is within the clearly apparent congressional intent to confine the act to the purely federal jurisdiction, as already shown, and such ruling does not preclude the application of the act to the United States District Court for Hawaii. Even if, as reasoned by the Territorial Supreme court, Congress in the NLGA was legislating only for the constitutional courts, the provisions thereof may be adopted for and made applicable to a legislative court by another congressional provision, namely, section 86 of the Hawaiian Organic Act. The question of such adoption has been con-

sidered in a number of cases. The effectiveness of such an adoptive statute to make applicable to a District of Columbia or territorial federal court provisions governing constitutional federal courts which had been enacted *prior* to the adoptive statute, is well settled.

However, where the case involves the effect of the adoptive statute with respect to a provision subsequently enacted, the matter is not so clear. See *Munoz v. Porto Rico Ry. Light & Power Co.* (1 Cir. 1936) 83 F. 2d. 262 (cert. den. 298 U.S. 689, 80 L. ed. 1408). In that case it was held that the United States District Court for Puerto Rico was not a true United States court, and that even under a provision of its Organic Act to the effect that

. . . Such district court shall have jurisdiction of all cases cognizable in the district courts of the United States, and shall proceed in the same manner (48 U.S.C.A. § 863),

later federal acts applicable generally to the federal judiciary or to "district courts" did not apply to Puerto Rico, citing *Benedicto v. West India & Panama Telegraph Co.* (1 Cir. 1919) 256 F. 417, 419. The court said, at pages 264-5:

Congress has always defined the jurisdiction of the District Court of the United States for Puerto Rico by acts expressly applicable to that court. . . .

We think section 9 of the Organic Act of Puerto Rico 1917 (48 USCA § 734), has no application to acts expressly applicable to District Courts of the United States. It only has reference to general acts that are without special application, but are broad enough to apply to the "possessions", and in their purport are properly applicable thereto.

These cases support the lower court's view that a federal legislative court is not a "court of the United States", besides laying down the rule that, even where there is a federal stat-

ute adopting for a court of *federal* jurisdiction in a Territory the laws relating to Federal district courts generally, later Federal laws applicable generally to the United States District courts will not ordinarily be held applicable to such Federal court in the Territory, unless clearly suitable and in their purport properly applicable thereto. The *Munoz* case, *supra*, cites three decisions of the Supreme Court which, on being analyzed, show that they are based on the doctrine that an adoptive statute does not operate on a statute later enacted. However, in a later case, *Balzac v. Porto Rico* (1922) 258 U. S. 298, 66 L. ed. 627, the Supreme Court held that an adoptive statute *can* operate on a statute later enacted. Hence, under this last decision, if the Norris-LaGuardia is "broad enough to apply to the" Territory "and in its purport is properly applicable thereto" (which it probably is, in view of the fact that it amends by implication the Sherman and Clayton acts which were applicable to the Federal courts in the Territories, though not to territorial courts of purely local jurisdiction—see *Hutcheson* case, *ante*, and Op. Br. 26-7, and *Puerto Rico v. Shell Co.* (1937) 302 U. S. 253, 82 L. ed. 235) it can be given full effect as to the U. S. District Court in Hawaii through the adoptive provisions of section 86 of the Hawaiian Organic Act, without any necessity for stretching the term "court of the United States" beyond its well settled meaning as including only the constitutional federal courts. Hence the fears of appellants (Op. Br. 65-72) that a different effect will be given to the Clayton and Sherman Acts than to the NLGA in the Territory by the lower court's decision, are unfounded.

Thus, the U. S. District Court for Hawaii saw no reason why the non-inclusion of the Territorial circuit courts should militate against the inclusion of that Federal court in the operation of the NLGA. *Alesna v. Rice* (U.S.D.C. Haw. 1947) 69 F. Supp. 897, 900.

*In re Maret*, (3 Cir. 1944) , 145 F. 2d. 431, 436, note 28, it was held that under a 1936 statute conferring on the District Court of the Virgin Islands jurisdiction of "all cases in admiralty" it had jurisdiction in an admiralty case arising under a 1943 statute.

The decision in *Mo Hock Ke Lok Po v. Stainback*, U.S.D.C. Haw. Civil No. 765, Oct. 22, 1947 concerning the applicability of section 266 of the Judicial Code, turns on the appropriateness of the section in question to the federal court in Hawaii, which we submit is the proper way to determine whether federal laws enacted after the enactment of section 86 of the Hawaiian Organic Act (Title 48, sec. 642, U.S.C.A), were made applicable to the federal court in Hawaii by that section.

While in this brief, we have produced an almost unanimous line of numerous decisions from the earliest times to date, in which "court of the United States", as used in statutes relating to jurisdiction and procedure of Federal courts, has been held not to include legislative courts, the diligence of counsel for appellants has produced but three cases, all clearly distinguishable, in which it is alleged a contrary holding has been made, namely, *Page v. Burnstine* (1881) 102 U. S. 664 (Op. Br. 32-34), *United States v. Haskins* (1875) 26 Fed. Cas. 213 (Op. Br. pp. 37-8), and *Hunt v. Palao* (1846) 4 Haw. 589, 11 L. ed. 1115 (Op. Br. 37), all of which are clearly distinguishable. Thus *Page v. Burnstine*, supra, is distinguished by the discussion thereof in the *McAllister* case, ante, p. 30, as well as by the quotation therefrom on page 33 of the opening brief, showing clearly that the main reason for holding the Federal statute applicable to District of Columbia courts in that case, was that Congress itself formulated *all laws, local and general*, for the District, whereas, in the Territories, there was *another legislative body*, authorized by Congress to make laws locally applicable, and whose *local enactments* therefore, would ordinar-



ily be left untouched by general federal laws, that is to say, laws designed generally to affect the Federal judiciary system. In this connection it should be unnecessary to deny the statement (Op. Br. 34) that "the Norris-LaGuardia Act is not a general law, but a law dealing with a special subject—the rights of labor". This is not true. The act applies *generally to the Federal courts*. Obviously it is a general law.

In the *Haskins* case, *supra*, sec. 33 of the Judiciary Act (later R. S. 1014) provided that for any crime against the United States the offender

may, by any justice or judge of the United States . . . be arrested, and imprisoned or bailed as the case may be for trial before such court of the United States as by this act has cognizance of the offense. . . . (1 Stat. 91).

Section 9 of the Organic Act of Utah (9 Stat. 453), a *later* act, established district courts for the territory and provided

And each of the said district courts shall have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States.

Section 16 of the same act provided:

The constitution and laws of the United States are hereby extended over and declared to be in force in said territory of Utah, so far as the same, or any provision thereof, may be applicable.

The defendant Haskins was indicted by a grand jury in the Territory of Utah for an offense (perjury) against the United States, and a warrant was issued to the Marshal of the United States for Utah Territory for his arrest. He was found in California, and in proceedings in a Federal court in California, after his arrest, the defendant claimed that

section 33 of the Judiciary Act did not apply. The court held that it did apply.

Several grounds of distinction of the *Haskins* case from the present one are immediately apparent. First, Utah Territory did not have two separate systems of courts, as in Hawaii, and therefore the only court with Federal jurisdiction in that territory was the district court there, and to hold otherwise than the Court did would have had the effect of letting him go scott free from the mere fact of his escape into a State from a Territory. While this decision might tend to support a contention that the U. S. District Court of Hawaii might be included under the Norris-LaGuardia Act, by virtue of the somewhat corresponding provisions of section 86 of the Hawaiian Organic Act (as shown ante) it can hardly be stretched to a holding that a *purely local and separate territorial circuit court with no federal jurisdiction* would also be covered by the term "court of the United States". Second, it is reasonable to presume, as the court did in the *Haskins* case, that Congress intended its *criminal laws* to be uniformly enforced within both the States and the incorporated territories (in the territorial courts expressly given Federal criminal jurisdiction), whereas, there is no basis whatsoever to presume that Congress would intend the laws applicable generally to the Federal judiciary system would also apply equally to territorial courts of purely local, and having no purely Federal jurisdiction, especially where Congress in other acts has *unmistakably indicated* that it *intended the procedure and jurisdiction of such local courts to be subject to the will of the local legislature*, as pointed out ante. Thirdly, it was not necessary for the court—and a one-judge court at that—to decide that a court of Utah was a "court of the United States", for the Organic Act of Utah had expressly vested in the Utah district courts "the same jurisdiction" over such cases "as is vested in the circuit and district courts of the United States", as quoted *supra*.

Finally, the utter inapplicability of the case of *Hunt v. Palao*, supra, to a situation like the present is unmistakably demonstrated by the court's opinion in *Clinton v. Englebrecht*, quoted ante, (1872) 80 U. S. 13 Wall. 434, 20 L. Ed. 659, which gives the true rule as to the construction of the term "court of the United States" as not including legislative courts of the Territories, and says:

There is nothing in this opinion inconsistent with the cases of *Orchard v. Hughes*, or of *Hunt v. Palao*, properly understood. The first of these cases went upon the ground that the chancery jurisdiction conferred upon the courts of the Territories by the organic was beyond the reach of Territorial legislation; and the second, in which the Territorial Court of Appeals was called a court of the United States, *was only intended to distinguish it from a State court.* (Emphasis added.) (80 U.S. 448-9, 20 L. ed. 663).

The desperation of appellants in seeking for some plausible authorities to counter those holding practically unanimously contrary to their contention as to the well-defined meaning of the term "court of the United States" when used in an act of Congress applying generally to the Federal judiciary system, is illustrated by the only two other references in the opening brief, one to the Federal Digest, which naturally would place territorial courts under some general heading implying that they owed their inception to general federal legislative power and which obviously is not using the words "United States Courts" in their technical or legal sense but rather in a generic sense (op. br. p. 39) and the other to an article in 43 Harv. L. Rev. 894 (op. br. p. 40), entitled "Federal Legislative Courts", in which the author, W. G. Katz, who prepared the same "in connection with graduate study in Harvard Law School in seminar courses of Professor Felix Frankfurter". (See Note, p. 894 of article), stated (43 Harv. L. Rev. 902):

It has *thus been settled* that all territorial courts and all courts of the District of Columbia, even those whose justices hold office during good behavior, are legislative courts. (Emphasis added.)

#### 4. The Context of the Norris-LaGuardia Act Itself Conclusively Indicates Its Inapplicability to the Local Circuit Courts.

Section 10 of the Norris-LaGuardia Act, (29 U.S.C.A. § 110) as pointed out in the lower court's decision, provides that

Whenever any Court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the Court shall, upon the request of any party to the proceedings and on his *filing the usual bond for costs*, forthwith certify *as in ordinary cases* the record of the case to the Circuit Court of Appeals for its review. . . .

This section is obviously designed and intended to apply to *all* "courts of the United States" where a temporary injunction is issued or denied in the first instance, and it clearly does not and can not apply to territorial circuit courts, appeals from which lie, not to a federal circuit court of appeals, but to the territorial supreme court. *Alesna v. Rice* (U.S.D.C. Haw. 1947) 69 F. Supp. 897, 900; and see, also, final decision in the same case, quoted in Appendix C hereof. Hence the term "court of the United States," as used throughout the NLGA could not have been intended to include such local circuit courts.

The title of the act also bears out this contention, as pointed out by the lower court (R. 59-68), being

An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes. (47 Stat. 70).

A mere reading of the act discloses that it is in fact solely a law directed at limiting drastically the jurisdiction and

regulating the procedure of Federal courts, and hence did clearly amend the Judicial Code which, up to that time, as construed by the Federal courts, had permitted Federal equity courts to issue labor injunctions without the limitations and regulations of the NLGA.

Corroborative of this statement as to the nature and effect of the NLGA as an amendment to the Judicial Code, might be pointed out, besides the numerous other circumstances mentioned in the foregoing pages of this brief, the following:

1. That the title of Senate Report No. 163 on the act is:  
TO DEFINE AND LIMIT THE JURISDICTION OF COURTS  
SITTING IN EQUITY.

The "other purposes" so strongly relied upon by appellants (Op. Br. 28-30) is *not even mentioned in the title* to this report, indicating clearly that, in the opinion of the Senate Judiciary Committee, the portions of the title reading "An Act to Amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity" meant one and the same thing—that the defining and limiting of jurisdiction of the equity courts concerned was an amendment of the Judicial Code which unquestionably relates primarily, if not exclusively, to the Federal courts as opposed to Territorial courts of local jurisdiction such as ours or State courts.

2. Likewise, the title of House Report No. 669 on the same act is:

DEFINE AND LIMIT THE JURISDICTION OF COURTS  
SITTING IN EQUITY.

3. The following excerpt from the debates on the act is also illuminating:

MR. MICHENER. May I ask this question: This bill, if made law, will be an addition to the Judicial Code?  
MR. CHRISTOPHERSON. Exactly.

Rep. Michener was one of the Representatives to whose remarks great significance was given in the majority opinion in the *Lewis* case (91 L. Ed. 607-8).

4. Mr. Justice Frankfurter's remarks in the *Lewis* case, quoted in Appendix D-8, p. lxi, and cited post, p. 92, showing that the title of the act (ignoring the "other purposes" portion thereof) truly represents the scope and purpose of the act, and that the act's terms justify its title.

Finally, Senate Report No. 163 on the NLGA, at page 23, referring to section 12 of the act, which provides for disqualification of judges in certain cases and for the designation of a substitute judge as "provided by law", says:

. . . Upon the finding of such a demand another judge shall be designated to hear the contempt proceeding, as provided in section 21 of the Judicial Code.

Section 21 of the Judicial Code so referred to is the one which provides for disqualification of judges of *Federal* district courts, and provides that in such cases a new judge shall be designated in the manner provided by other Judicial Code sections (28 U.S.C.A. 24 and 27), none of which apply to territorial courts having no Federal jurisdiction.

In this connection, we wish also to point out that if, as appellants' contend, (Op. Br. 50-51), sec. 10 of the NLGA is applicable to Territorial circuit courts, this would necessitate a ruling that sec. 10 by implication amended and superseded, not only most of the local statutes relating to review of circuit court judgments which provide for such review *by the Territorial Supreme Court* (See R. L. 1945, Ch. 182, Appeals; Ch. 184, Exceptions; and Ch. 186, Writs of Error), but also the general Federal statute on appellate jurisdiction of the circuit courts of appeals 28 U.S.C.A. 225. However, this possibility staggers even the appellants, who, after half-heartedly contending that Congress has the *power* to make such an amendment (Op. Br. 51), which of course it does, then seek cover in arguing that anyway the rights

under the NLGA are substantive and must therefore be given effect somehow, even if sec. 10 is inapplicable (Op. Br. 51). The "substantive rights" argument will be disposed of later in this brief.

**5. The Norris-LaGuardia Act's Purpose Was to Carry Into Effect the Original Intent of the Clayton Act, Which, With the Sherman Act That It Amended, Never Applied to Circuit Courts of this Territory; Therefore the Norris-LaGuardia Act Could Not Have Been Intended to Apply to Such Local Circuit Courts.**

It is contended on pages 25-8 of the opening brief, that the Norris-LaGuardia Act is an amendment of the Clayton Act and must be read in connection therewith in construing the intent of the former. The *Hutcheson* case (312 U. S. 219, 85 L. ed. 788), is quoted (Op. Br. 26) to the effect that:

The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction.

The opening brief then proceeds to quote further from that decision, which in turn quotes from the report of the House Committee on Judiciary, to the effect that

The purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act . . . which act, by reason of its construction and application *by the Federal courts*, is ineffectual to accomplish the congressional intent. (Emphasis added.)

Other excerpts from and references to the Congressional reports and debates to the same effect are quoted in Appendix D-4, page 1.

Accordingly, we agree with appellants that the NLGA was intended to go as far as the Clayton Act was originally intended to go as to the courts covered, but *no further*. And

to what courts did the Clayton Act apply? Clearly not to the Territorial Circuit Courts. Appellants tacitly, if not expressly, admit this in their opening brief, pp. 49, 54, 64, 72, 73, 90, in arguing that the Clayton Act applied to *federal* district courts for the territories, and that the NLGA allegedly went "beyond the Clayton Act" in its coverage. (Op. Br. 73).

In this connection, we do not dispute that the Sherman and Clayton Acts were effective in the Territories, including Hawaii, that the definitions of "commerce" and "persons" included intrastate (or intra-territorial) commerce in the Territories and corporations organized under the laws of any Territory, (Op. Br. 27, 55-72). But we must again call this court's attention to the straw man being set up here by appellants in inferring that the lower court ruled that the U. S. District Court for Hawaii was not subject to the Clayton, Sherman or Norris-LaGuardia Acts. This is not so, as demonstrated ante, pp. 2, 35.

Appellants contend that this court should hold that the NLGA intended to confer exclusive jurisdiction on the Federal district court of Hawaii in cases involving issuance of temporary or permanent injunctions growing out of labor disputes in the Territory and thereby deprive territorial circuit courts of all jurisdiction even to entertain such suits. Op. Br. 88-90. This argument (which by its tenuousness is an implied admission of the weakness of appellant's contention that the NLGA's definition of "court of the United States" includes territorial circuit courts) is answered in the negative by *Puerto Rico v. Shell Co.* (1937) 302 U.S. 253, 82 L. ed. 235, holding that the Sherman and Clayton Acts (which appellants contend so violently should be construed in *pari materia* with the NLGA to disclose congressional intent), did not deprive Puerto Rican courts of jurisdiction under local statutes covering in part the *same area* of legislation embraced by those acts, which is not even the case here, where the NLGA and the local territorial laws con-



cerning injunctions in labor disputes cover entirely different areas of legislation—i.e., entirely different sets of courts. See, also *Territory v. Long Bell Lumber Co.* (Okla. 1908) 99 P. 911, cited with approval in the *Shell Co.* case *supra*, and *Wagner v. Minnie Harvester Co.* (Okla. 1910) 106 P. 969.

The effect, then, of appellants' contention on this point—that the scope and coverage of the Norris-LaGuardia Act is the same as that of the Clayton and Sherman Acts and must be given the same effect—is to exactly confirm the decision of the Hawaiian Supreme Court in its holding that the local laws concerning the jurisdiction and procedure of the local circuit courts were not superseded or pre-empted by the Norris-LaGuardia Act.

The trouble with Point III (pp. 55-72) of the opening brief is that it attempts to stretch the coverage of the Sherman and Clayton Acts over "commerce," "persons" and *Federal courts* in a Territory, to include *both Federal and local circuit courts* for purposes of the NLGA which is a palpable *non-sequitur*.

**6. The Definition in Section 13(d), Limiting Courts Covered to "Any Court of the United States" Whose Jurisdiction Might be Affected by Congress, etc., Was Included Only Because Congress Wanted to be Sure to Exclude the Supreme Court, and to Include the Courts of the District of Columbia.**

Appellants take issue (Op. Br., Point D-1, pp. 40-45) with the lower court's reasoning (Rec. 64-5) that

In restricting the definitive phrase "any court of the United States" by the clause "whose jurisdiction has been or may be conferred or defined or limited by Act of Congress" . . . the section accomplishes two primary objectives . . . One is to eliminate for the purposes of the Act the Supreme Court, whose appellate and original jurisdiction stems from the Constitution . . .

Here again, for want of an effective answer to the lower court's statement as far as it applies to the Supreme Court's *original jurisdiction*, appellants set up the straw man of *appellate jurisdiction* which, as we shall show, was not germane to the question at all, and then proceed to knock it over. We need waste no time trying to controvert the proposition that the appellate jurisdiction of the Supreme Court can be limited by Congress. If the statement by the lower court that it "stems from the constitution" is incorrect, this is still immaterial, because the remainder of the statement is emphatically true, as hereinafter demonstrated. In this connection, appellants themselves fall into grievous error in the statement (op. br. 44-5) :

The Act does not, in fact, affect the *original jurisdiction of the Supreme Court to issue injunctions* because it exercises *no original jurisdiction in equity*. This being true, the Court is attributing to Congress an absurd Act, and the Court's presumption of a Congressional intent to exclude the Supreme Court in framing the definition of the Norris-LaGuardia Act is clearly erroneous.

We have already mentioned ante, p. 29-30, Art. III, secs. 1 and 2, of the Constitution which directly vest judicial power in the Supreme Court and grant it original jurisdiction "in all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party," and have pointed out that Congress could not make the Norris-LaGuardia Act applicable to a case originally brought in the Supreme Court wherein a *State* applied for an injunction in a labor dispute. This is sufficient to demonstrate the error of the foregoing statement in appellants' brief.

In *Pennsylvania v. West Virginia* (1923) 262 U. S. 553, 67 L. ed. 1117, the court held that suits in equity by two different states against West Virginia, instituted in the United States Supreme Court, praying for an *injunction* against the enforcement of an allegedly unconstitutional

West Virginia Statute, involved a "justiciable controversy between states in the sense of the Judiciary Article of the Constitution," and that the court therefore had jurisdiction to determine the same, and the injunction was granted. (262 U. S. 591, 67 L. ed. pp. 1129-1130). This was a direct holding that the *Supreme Court possessed equity powers as part of its original jurisdiction*.

Furthermore, the history of the NLGA clearly demonstrates that Congress believed that it could not thus limit the original jurisdiction of the Supreme Court, and inserted this qualification for the sole purpose of avoiding any question of constitutionality which might be raised if the original jurisdiction of the Supreme Court was attempted to be restricted by the act.

Thus it was very strongly argued by the minority (and disputed by the majority) in each House that Congress did not even have the power to limit the jurisdiction of the *inferior* Federal Courts in the manner provided by the NLGA, and it was apparently conceded by all factions, that Congress *did not have power* to limit the original jurisdiction of the Supreme Court as to the issuance of injunctions. This is clearly demonstrated by the excerpts from the debates and committee reports on the NLGA, which, with necessary explanatory remarks, are quoted in Appendix D-5, pp. li-lvi.

The statements set forth or referred to in Appendix D-5 clearly demonstrate that Congress had very definitely in mind the limitations on its power to restrict the *original* jurisdiction in equity matters conferred upon the Supreme Court by Article III, secs. 1 and 2 of the Constitution, and wished to avoid any question of constitutionality by inserting in the definition of the term "court of the United States," the limiting language "any court of the United States" whose jurisdiction (clearly meaning *original* jurisdiction) could be limited, etc., by Act of Congress. This sustains the correctness of the lower court's reasoning to the

effect that these words were inserted, not to make the definition *more inclusive*, and thereby include legislative courts, but to *exclude* the Supreme Court.

On pages 45-50, appellants assail the lower court's reasoning as to the significance of the express inclusion of the District of Columbia courts in the definition of "court of the United States" in section 13 (d) of the NLGA. To be sure the lower court appears to speculate that the reason for such express inclusion was the statement of the Supreme Court in *Ex Parte Bakelite Corporation*, (1929) 279 U. S. 438, 73 L. ed. 789, decided *three years before* the Norris-LaGuardia Act was passed, to the effect that the courts of the District of Columbia were legislative, rather than constitutional courts, it not having been held by the United States Supreme Court that they were constitutional courts until the decision in *O'Donoghue v. United States* (1933) 289 U. S. 516, 77 L. ed. 1356. Whether the *Bakelite* ruling was *obiter dicta* or not, the fact remains that at the time Congress was considering the Norris-LaGuardia Act, and until the *O'Donoghue* case was decided, it was unanimously considered by the best authorities, including Prof. Frankfurter, that the District of Columbia courts were *legislative courts*, and there was therefore strong reason for the lower court to consider such express inclusion as an implied exclusion of *other* legislative courts.

Nor was the *Bakelite*\* ruling as "obscure" as appellants' brief would have us believe (Op. Br. 48). It was widely written up in the law reviews in 1930, two years before the Norris-LaGuardia Act was passed. Articles on the *Bakelite* case came out in 24 Ill. L. Rev. 820 (Mar. 1930); 10 B.U.L.

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\* It is significant that the so-called dictum in the *Bakelite* case cites two cases, *Keller v. Potomac Elec. Power Co.* (1923) 261 U. S. 428, 442-4, 67 L. ed. 731, 736-7, and *Postum Cereal Co. v. California Fig Nut Co.* (1927) 272 U. S. 693, 700, 71 L. ed. 478-481, as authority for the statement that District of Columbia courts had been held to be legislative courts. One of these two cases is cited in 24 Ill. L.

Rev. 820, *supra*, as authority for the statement, in an article entitled "Administrative Law—Legislative Courts—U. S. Court of Customs Appeals", which reads:

There are a number of bodies or officers in our system that exercise the functions of a legislative court. The territorial courts, erected by Congress, are true courts, but fall in this class. . . . *So, too, the courts of the District of Columbia; Keller v. Potomac Elec. Power Co.* (1922) 261 U. S. 428, 442-3. . . .

The other of these two cases, the *Postum Cereal Co.* case, is cited in the Boston Law Review note, *supra* (10 B.U.L. Rev., p. 82) in support of the statement that:

The courts of the District of Columbia are held legislative under the power given Congress to exercise exclusive jurisdiction over that locality given in the United States Constitution, Art. I, § 8.

Furthermore, in Note 87 in the Article in 28 Mich. L. Rev., on page 518, Prof. Shartel of the University of Michigan Law School says:

In *ex parte Bakelite Corporation*, . . . (and in numerous other cases therein cited) the Supreme Court makes a distinction between constitutional and legislative courts of the United States. The district and circuit courts are constitutional in the sense of the distinction; the legislative courts include territorial courts, courts of the District of Columbia, the Court of Claims, the Court for Customs Appeals and other customs courts. . . . (Emphasis added.)

In this connection, this court is again reminded of the quotation from the article (cited in the opening brief, p. 40) in 43 Harv. L. Rev. 894, at page 902, quoted ante, pp. 43-4, in which it was stated to have "been settled" that "all courts of the District of Columbia . . . are legislative courts", which article was written by a protege of Prof. Frankfurter.

It is most significant to note the frequency with which Prof. Frankfurter is quoted or referred to in both reports (House and Senate) (H. Rept. No. 669, p. 12; Sen. Rept. No. 163, pp. 3, 8, 21). It should be noted also, that the case of *Keller v. Potomac Electric Power Co.*, *supra*, cited in Prof. Frankfurter's memorandum at the end of the House Report, p. 16, although on another point (that constitutional courts—referred to merely as "courts" in the memorandum—may not be given the duty of passing upon matters which other branches of the Government are peculiarly adapted to decide, the memo saying: "These are the types of cases in which the power of Congress over the judiciary has been successfully controverted"), is one of the two decisions cited in the *Bakelite* case on the proposition that District of Columbia Courts are legislative courts.

Rev. 81 (Jan. 1930) ; 28 Mich. L. Rev. 485, 518, Note 87 (Mar. 1930) ; and all of these were referred to in connection with the *Bakelite* case in a note on the first page of the very article in 43 Harv. L. Rev. 894 (published Apr. 1930) cited on page 40 of the opening brief, and discussed ante pp. 43-4, and note pp. 52-3.

It will thus be seen that the so-called dictum in the *Bakelite* case was neither obscure nor unnoticed by the general authorities, and that, in any event, it was regarded, as early as 1930, when the above mentioned Law Review Articles were published, as *settled law* that the District of Columbia Courts were legislative courts. Congress could very well, therefore, have inserted the express inclusion of such courts in the definition of section 13 (d) of the NLGA, for the purpose of making it certain that such courts were included, even if they ordinarily would not, as supposedly legislative courts, be included in the term "court of the United States," and this would naturally lead to an implication that other legislative courts were not intended to be included.

On the other hand, the only two other possible reasons that we can think of why Congress should have thus expressly included the District of Columbia Courts, are: (a) that the Federal courts of the District of Columbia had often been called upon to issue labor injunctions of the type considered improper by Congress, and instances had been cited in the Congressional debates of such injunctions issued by those courts; Congress would therefore naturally want to include them expressly, lest, because of their supposedly special nature (having both Federal and local jurisdiction) they be thought to have been purposely omitted; on the other hand there was not cited, throughout the entire congressional debates, a single instance, so far as we have been able to find from reading the entire record thereof, of an alleged abuse of labor injunctive powers by a territorial Federal or local court; and (b) that possibly Congress felt it desirable to conform to the terminology of the Clayton

Act, which, in sections 21 and 23 thereof, (28 U.S.C.A. 386, 388) regulating contempt procedure speaks of contemptuous violations of any writ, etc., of "any district court of the United States or any court of the District of Columbia" (sec. 21), and provides for admission to bail on appeal in a reasonable sum required by the "court, or by any justice, or any judge of any district court of the United States or any court of the District of Columbia."

None of these reasons, however, would militate against the ultimate conclusion of the lower court herein that, in any event territorial circuit courts of purely local jurisdiction were not intended to be covered by the Norris-LaGuardia Act, for, under any theory whatsoever that may be adopted to account for Congress's actions, if it took express mention to be sure that the Courts of the District of Columbia were included in the act, how much more specific would Congress have been in order to be sure that territorial courts with *no federal jurisdiction whatsoever*, would be included, if such had been their remotest intention.

**7. The History of this Legislation Shows Clearly that Congress Had in Mind the Constitutional Inferior Federal Courts and Those of the District of Columbia Only, and That Its Purpose Was to Correct Abuses in the Federal Courts Only.**

We shall now proceed to show from the committee reports, the Congressional debates, and other historical circumstances, that the evil aimed at by this act was abuses of the injunctive powers by the Federal constitutional inferior courts and those in the District of Columbia, and that Congress, throughout the entire process of formulating this legislation, had only such courts in mind. Justification of this resort to the history of the act is more specifically pointed out *infra*. This is offered, not to prove that the United States District Court for Hawaii is not covered by

the act, but rather to show an utter lack of intent in the act to include non-Federal, purely local Territorial courts such as our circuit court, and thereby to supersede local laws on the jurisdiction and procedure of such local courts.

**A. Reference to Legislative History is Proper in This Case.**

It is a cardinal principle of statutory construction, where the words of a law are not clear, as in this case with respect to purely territorial courts, that the committee reports and congressional debates, and the history of the legislation may be resorted to, in order to determine what was the condition sought to be remedied and therefrom derive the intent of the law-making body.

Since the language of the Act is not free from doubt in the particulars mentioned, we are justified in seeking enlightenment from the reports of the Congressional committees and explanations given on the floor of the Senate and House by those in charge of the measure.

When the legislative history of the bill is thus surveyed, it becomes clear that to construe the Act otherwise than as giving the courts broad power to curtail the stay for the protection of the mortgagee would be inconsistent not only with provisions of the Act, but with the committee reports and with the exposition of the bill made in both Houses by its authors and those in charge of the bill and accepted by the Congress without dissent. We construe it as giving the courts such power.

Brandeis, J., in *Wright v. Mountain Trust Bank*  
(1937) 300 U. S. 440, 463-4, 81 L. Ed. 736, 744.

In view of the well-settled meaning of the words "court of the United States" prior to the adoption of the Norris-LaGuardia Act to mean only the constitutional Federal courts (ante, pp. 29-34), the express inclusion of the District of Columbia courts without express mention of the Federal or any other courts in the Territories (ante, pp. 49-55), the inappropriate and incongruous language of



section 10 of the act if Territorial circuit courts are attempted to be brought into the purview of the act (ante, pp. 44-47), it must be certainly conceded that the inclusion of such territorial circuit courts within the act is not clear. Of course, appellees contend that the language of the act is clearly exclusive of local Territorial circuit courts, but, if it is not (as contended by appellants), then there is sufficient ambiguity, in view of the circumstances pointed out above in this paragraph, to warrant our resorting to the reports and debates of Congress, the history of the legislation, and other appropriate aids to statutory construction where the meaning is not clear and unequivocal. As already pointed out ante, p. 36, even Justice Frankfurter, in the *Hutcheson* case, found it necessary to resort to such extrinsic aids to reach his conclusion that the scope of section 20 of the Clayton Act (as previously construed by the courts) had been broadened by the Norris-LaGuardia Act. And in the so-called *Lewis* case (*U. S. v. United Mine Workers of America* (Mar. 6, 1947) 330 U. S. (Adv. Sht.) 258, 91 L. Ed. (Adv. Sht.) 595) the majority of the court delve copiously into the history and debates on this act to assist in reaching their conclusion that the act did not restrict the *Federal courts* in issuing injunctions in certain labor disputes where the Government was the petitioner. Thus the Chief Justice, in the majority opinion, refers to the comments on the bill of "Representative LaGuardia, the House sponsor of the bill" (91 L. Ed. 606), to disprove any Congressional "intent to legislate concerning the relationship between the United States and its employees" (Id. p. 606); to the debates in both Houses and numerous references therein to previous instances in which the United States had resorted to the injunctive process in labor disputes between private employers and private employees to "indicate that Congress, in passing the Act, did not intend to permit the United States to continue to intervene by injunction in

purely private labor disputes" (Id. pp. 606-7) ; and then says:

. . . Indeed, when we look further into the history of the Act, we find other events which unequivocally demonstrate that injunctive relief was not intended to be withdrawn in the latter situation. (Id. p. 607) .

Then follows a reference to views stated by Minority leader Michener, and Rep. Schneider, with the comment:

We cannot but believe that the House accepted these authoritative representations as to the proper construction of the bill. (Id. p. 607) .

Turning to the dissenting opinion (in part) of Mr. Justice Frankfurter, upon whose opinion in the *Hutcheson* case so much reliance is placed in appellants' brief, we find that even he resorted to the history of the act and the debates thereon (Id. pp. 625-628) . Similar resort to the legislative history of the NLGA in seeking light on the Congressional intent is made in the dissents or partial dissents of Justices Black, Douglas and Murphy in the same case. (Id. pp. 632. 637-9) .

#### **B. References in Reports and Debates to Federal Courts and Federal Judges.**

Having thus established the propriety of resorting to the legislative and other history of the act to determine congressional interest in this connection, we find the following significant circumstances as to intent, disclosed by that history, indicating that Congress's attention was directed solely to the constitutional Inferior Federal Courts and those of the District of Columbia, and at the most to purely Federal courts.

The Congressional Record, as well as the reports of both Judiciary Committees of the House and Senate on the NLGA bear out the above views of Prof. Frankfurter, being

replete with references to the *Federal* courts as the only ones whose alleged abuses were the occasion for and the subject of the remedial provisions of the act, and the only ones whose jurisdiction and powers were aimed at. It is fair to say that these expressions occur on almost every page of these reports and debates, whereas *not once*, as far as we have been able to discover, has there been a reference in any of these reports and debates to a Federal court in a Territory or any other legislative court (other than the then supposed-to-be-legislative courts of the District of Columbia), nor is there any statement in those reports and debates, we submit, which by any fair interpretation can be construed to have in contemplation purely territorial courts of local jurisdiction such as our circuit courts. See typical statement of Rep. Sweeney, and other references in Appendix D-6, pp. lvi-lvii, as well as other excerpts throughout this brief and in Appendices.

Incidentally, it would not appear amiss, in view of the recent abusive trends which brought about the decision in the *Lewis* case and the enactment of the Taft-Hartley Law, to quote Rep. Fernandez's prophetic remarks:

Because of the injustices and abuse of power on the part of some of the Federal judges this legislation was enacted; and if, on the other hand, labor organizations or their sympathizers will unscrupulously violate the intention of this act, they will in no uncertain terms draw the same condemnation to these practices from the great American people, so much so as the far-reaching injunctions heretofore issued and now the issue of rebuke. (75 Cong. Rec. 5513).

### C. Federal Judges with Life Tenure Were Particularly the Targets of Criticism.

A further indication that, in considering the act, Congress did not have in mind Federal courts in the Territories, *much less* territorial circuit courts of purely local jurisdiction, is found in the specific references, in the debates, to

*Federal judges with life tenure.* In none of the Territories or possessions, except in the District of Columbia, whose courts were specifically included in the act, did the judges enjoy life tenure at the time the act was under consideration. Examples of such references in the debates are the remarks of Sen. Norris, the chief proponent of the bill in the Senate, and Rep. Black quoted in Appendix D-7, p. lvii-lviii.

#### IV.

**Whether or not the NLGA as construed in the Hutcheson case confers substantive rights, is immaterial to the issues of this case.**

Throughout most of their opening brief, appellants appear to rely upon the so-called "substantive rights" allegedly granted by the NLGA as that act is claimed by them to have been construed in *U.S. v. Hutcheson* (1941) 312 U.S. 219, 85 L. Ed. 788 (Op. Br. 25-31, 51, 56-88). This contention will be discussed generally later (*infra* pp. 65 et seq.).

It is not clear from the opening brief just what alleged substantive rights claimed to have been conferred by the NLGA on appellants were infringed by the issuance of the injunction in this case in the Second Circuit Court of the Territory, nor is it clear just what bearing such alleged substantive rights have on the question of the proper construction of the term "court of the United States" or other provisions of the NLGA.

#### **1. Nowhere in the Record is the Question of Alleged Infringement of Substantive Rights Raised.**

R.L. Hawaii 1945, Sec. 10271, provides, with respect to the requirements in a petition for a writ of prohibition, that

The defendant who applies for this writ shall apply by petition addressed to the justices of the supreme court, or to any single justice thereof, or to a circuit judge, stating the cause and nature of the action

brought against him, and *showing that the inferior court is not competent to try it, or that it has exceeded its jurisdiction in the trial or hearing of such action*, which petition shall be verified by the oath of the applicant or by some other person on his behalf cognizant of the facts. (Emphasis added.)

The Territorial supreme court, in *Carter v. Gear* (1905) 16 Haw. 412, 417-418, said:

The propriety of issuing the restraining order in this instance cannot be inquired into upon prohibition. The question of power is the only one that can be considered. . . . We cannot find that a circuit judge sitting in probate is absolutely without such power under the particular circumstances of this case so as to justify the issuance of a writ of prohibition.

In *Bandini Petroleum Co. v. Superior Ct.* (1931) 284 U.S. 8, 76 L. ed. 136, which was an appeal from the refusal of the California appellate courts to issue a writ of prohibition to a California trial court which had issued a temporary injunction under a California Statute for conservation of natural resources, the Supreme Court held that the writ of prohibition is not available as a substitute for an appeal from a court having jurisdiction; and that a petition for such a writ to restrain the enforcement of an injunction issued by another court cannot, by annexing to and making a part of the petition the pleadings in the injunction suit and the affidavits presented upon the hearing of the application for preliminary injunction, or by a characterization of the evidence thus adduced, or by pleading the conclusions derived therefrom, substitute the court to which application for the writ is made for the court to which the writ is sought, in the determination of the facts, or of the law addressed to the facts, which should properly be considered by the latter tribunal.

If, therefore, the second circuit court had jurisdiction to

issue an injunction in a labor dispute without complying with the formal and procedural requirements of the Norris-LaGuardia Act—on the theory sustained by the territorial supreme court that it was not a “court of the United States” within the meaning of that act—the propriety of the issuance of the injunction would not, under the foregoing decisions, be a proper subject for the writ of prohibition, at least unless the injunction was absolutely void.

However, no claim was made before the supreme court of the Territory in the Petition for Writ of Prohibition, or elsewhere in the record, or even in the assignments of error, that could be construed as a claim that substantive rights were infringed by the terms of the injunction—the only claim being made throughout the entire case being one of failure on the part of the petitioners in the injunction suit in the Second Circuit Court to allege, and failure on the part of the circuit court to require compliance with or make findings in accordance with certain procedural requirements specifically named in the Petition for Writ of Prohibition as alleged requirements of the NLGA claimed to be applicable directly to the Second Circuit Court on the sole ground that it was allegedly literally a “court of the United States” under that act.

The Petition for the writ of prohibition, after stating that the petitioners are trade unions, or members or officials thereof (Paras. I, II; R. 16), that a petition for injunction had been filed by the corporate respondent Maui Agricultural Co., Ltd., and a temporary restraining order had been issued ex parte by the respondent Wirtz, Judge of the Second Circuit Court (Paras. III-VII; R. 16-17), and the existence of a labor dispute (Para. VIII; R. 18), alleges (R. 18-20):

## IX.

That said Circuit Court . . . is a court of the United States as defined under the . . . Norris-LaGuardia Act (29 U.S.C.A. sections 101, 113).

## X.

That under the terms of the said Norris-LaGuardia Act no court of the United States may issue an injunction or restraining order in a labor dispute without first complying with all of the terms and provisions of said Act.

## XI.

That on the face of said petition for injunction it is not shown that petitioners in said petition for injunction have complied with the terms of said Act, nor have they in fact complied with the provisions of said Act, and your petitioners affirmatively allege that petitioners in said petition for injunction did not, and have not complied with said Act, in the following respects, among others: . . .

(Then follow seven allegations of alleged failure of the allegations of the petition to conform to the literal requirements of the NLGA or of the court to conform thereto.)

## XII.

That by virtue of the terms and provisions of said Norris-LaGuardia Act, and the allegations contained in this petition said Honorable Cable Wirtz as judge of said court and said court as aforesaid were and are without jurisdiction to proceed further, or proceed at all in relation to the matters set forth in said petition or to make any adjudication therein or issue any orders therein, and were without jurisdiction to issue said temporary restraining order, or said order to show cause issued in said proceedings. . . .

None of these allegations can be construed to raise any question of the propriety of the issuance of the temporary restraining order or of the terms of the order either as it might affect alleged substantive rights or otherwise, if the Second Circuit Court is not a "court of the United States" as defined in the Act. The return of Judge Wirtz to the alternative writ of prohibition denies that the Second Cir-

cuit Court is a "court of the United States" within the meaning of the NLGA, (Paras. III-V, VIII; R. 46-50, 54-55). Likewise, the return of the Maui Agricultural Co., Ltd., denied that the Second Circuit Court was a "court of the United States" as defined in the NLGA and denied the act's applicability to a circuit court of the Territory (Paras. II and III; R. 56). Judge Wirtz's return further alleges that the temporary restraining order was properly and lawfully issued

for good and sufficient cause and in accordance with the laws, practice and rules of court applicable to said Circuit Court and the Judge thereof presiding at chambers in equity. (Para. VIII; R. 54).

The petitioners for the writ of prohibition (appellants herein) made neither formal nor informal denial of the allegations of the returns, including the last quotation above from Judge Wirtz's return, and the Territorial Supreme Court found that the procedure followed by Judge Wirtz was "admittedly in conformity with the laws of the Territory", the procedure required by the NLGA being held not applicable to such circuit court as not being a "court of the United States" (Op. Terr. Sup. Ct., R. 58; on Rehearing, R. 77).

Nor do the assignments of error (R. 5-6), raise any contention of deprivation of substantive rights, or point out in any way any alleged substantive rights of which appellants have been deprived. Hence, the only issue before the territorial supreme court, as already pointed out ante, pp. 2, 4, was not whether the terms of the restraining order itself deprived the appellants herein of substantive rights, but whether the Second Circuit Court was a "court of the United States" as defined in that act. For this reason, it is submitted that the question of whether the NLGA, as construed in the *Hutcheson* case, confers substantive rights is absolutely immaterial to the issues of this case. Further



analysis of the "substantive rights" claim will make this even more apparent.

**2. The Norris-LaGuardia Act is Primarily a Procedural Statute, and Relates to the Purely Federal Courts, and Its Substantive Effect, If Any, Relates Only to Penalties Prescribed by Federal Statutes, or the Denial of Rights of Action in Federal Courts.**

**A. The "Substantive Rights" Argument is an Attempt to Achieve Indirectly an Effect on the Territorial Courts which the NLGA does not have Directly.**

Although this is not clear from the opening brief, it is possible that appellants intended to argue that if, as contended by them, the Norris-LaGuardia Act conferred substantive rights, then, regardless of any inadequacies of verbiage in the Act, the Territorial Courts must give effect to those substantive rights by declining to take any action which would adversely affect such rights. This is but another way of arguing that the Act contains clear indications of some overriding Congressional intent which can only be given effect by holding circuit courts of the Territory subject to the NLGA even though they are not to be "courts of the United States" within the definition of the Act. However, the opening brief fails to point out the one thing essential to make this argument effective or even applicable, namely, what are those alleged substantive rights which they contend the issuance of the temporary restraining order by the Second Circuit Court adversely affected, nor is the question raised by the record (see ante, pp. 60-65).

The statements of public policy of the United States contained in secs. 2 and 3 of the Act (29 U.S.C.A. 102, 103) and some dicta in and the alleged substantive effect of the *Hutcheson* case are relied upon to indicate such an intent. (Op. Br. 26, 27, 51, 53, 56-72, 74-88). Such arguments utterly overlook the scheme and purpose of the NLGA, as

carefully worked out by Congress and developed *infra*. As already pointed out (*ante*, pp. 27-29) the statements of public policy in those sections of the Act are carefully tied down to enforcement or attempted enforcement of rights claimed contrary to such public policy *in the "courts of the United States"* as defined in that Act. That is to say, the policies are to be enforced with respect to the jurisdiction and procedure of those courts and those courts alone which are defined in the Act.

The *Hutcheson* case merely did what every court from time immemorial has done in construing statutes—it took the Sherman, the Clayton and the Norris-LaGuardia Acts, all of them directed the *same subject*, at least as far as jurisdiction and procedure of Federal courts is concerned, particularly with reference to injunctions in labor disputes (which is the exact subject covered by section 20 of the Clayton Act), and all of them relating to the *same courts* (taking the utmost coverage of courts that the NLGA can be construed to cover consistently with its own provisions), that is to say, the *purely Federal courts*, and construed them together *in pari materia*. Moreover, the very legislative history and congressional reports and debates on the NLGA expressly tied that act in with the Sherman and Clayton Acts as one whole system of laws and this was pointed out in Mr. Justice Frankfurter's opinion in the *Hutcheson* case. There is nothing in any of such reports and debates to tie that Act in with our Territorial courts of non-Federal jurisdiction.

As pointed out *ante*, pp. 35, 37-40, it is not necessary to hold territorial circuit courts of non-Federal jurisdiction to be included within the coverage of the NLGA, in order to give *full scope and coverage* to both that act and the Sherman and Clayton Acts. If, as claimed by appellants (*Op. Br.* 55-72), the same scope must be given in the territories to the NLGA as is given in them to the Sherman and Clayton Acts, the same full scope and coverage accorded the Sher-

man and Clayton Acts can be given to the NLGA in Hawaii by holding that the Federal District Court in Hawaii is also subject to the NLGA. There is thus no inconsistency with any Federal statute.

**B. The "Substantive Rights" Under the Last Clause of Sec. 20 of the Clayton Act and Sec. 4 of the Norris-LaGuardia Act Construed Together Relate to Federal Law Only and Do Not Affect Territorial Law.**

(1) *The Meaning of "Substantive Rights".*

It is necessary at the outset to determine just what is meant by "substantive rights". Substantive rights are rights which arise or exist by reason of statute or other law dealing with matters of substance, as distinguished from statute or other law dealing with matters of procedure. In other words, "substantive rights" are rights created by substantive law, which has been defined

as meaning that part of the law which created, defines and regulates rights, as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtaining redress for their invasion. (Ballentine, Law Dictionary, p. 1246).

Although the authorities are not uniform as to whether various types of statutes or other law are substantive on the one hand, or adjective or remedial on the other, in their effect in a given situation, the above is the true technical distinction between the two types of rights and the two types of law which create them.

The first paragraph and all except the last clause of the second paragraph of Section 20 of the Clayton Act (29 U.S.C.A. 52) relate to procedural matters only, i.e., they restrict and define injunctive relief which may be granted by courts of the United States in certain cases relating to labor disputes.

Similarly Section 4 of the Norris-LaGuardia Act (29 U. S. C. A. 104) purports by its language to relate to pro-

cedural matters only, i.e., its restricts and defines injunctive relief which may be granted by courts of the United States in cases involving or growing out of labor disputes.

Whatever substantive rights may be claimed under Section 20 of the Clayton Act exist under and by reason of the last clause of Section 20, to the effect that:

Nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Any substantive rights under Section 4 of the Norris-LaGuardia Act exist under and by reason of the decision of the United States Supreme Court in *United States v. Hutcheson*, (1941) 312 U.S. 219, 236, 85 L. ed. 788, 795. We are prepared to assume,\* for the purpose of our argument, that the Supreme Court held in the *Hutcheson* case that Congress, by enacting Section 4 of the Norris-LaGuardia Act, intended that the specified acts listed in Section 4 should be removed from the taint of being a "violation of any law of the United States", including the Sherman Anti-Trust Act. In other words we are prepared to assume that the Supreme Court held that the last clause of Section 20 of the Clayton Act is applicable, not only to the specified acts listed in said Section 20, but also to the specified acts listed in Section 4 of the Norris-LaGuardia Act.

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\* There is some doubt as to the correctness of the assumption made in the foregoing paragraph. It may be that the decision in the *Hutcheson* case merely held that the terms "labor dispute" and "persons participating or interested" therein, as defined in Section 13 of the Norris-LaGuardia Act (29 U.S.C. 113), should be accepted as indicating the Congressional true meaning of labor disputes under Section 20 of the Clayton Act. There is considerable in the opinion of the court in the *Hutcheson* case to indicate that this was the extent of its decision. Furthermore the opinion of Mr. Justice Stone, concurring, assumed that this was the extent of the decision. If this was the extent of the decision, then Section 4 of the NLGA does not create substantive rights and is of procedural significance only. Nevertheless, as above stated, our argument is based on the assumption above stated.

(2) *The Substantive Rights Relate to Federal Law Only, not to Territorial Law.*

It appears to be the position of appellants that the last clause of Sec. 20 of the Clayton Act and Sec. 4 of the NLGA operate as limitations on Territorial law as well as limitations on Federal law. It is our position however that such provisions operate only as limitations on Federal law. (As used in the argument hereinafter "sec. 20" refers to sec. 20 of the Clayton Act, and "sec. 4" refers to sec. 4 of the NLGA.)

The motive behind the adoption of Section 20, and particularly the last clause thereof, was to amend the substantive provisions of the Sherman Anti-Trust Act (15 U.S.C.A. 1-7) and to restrict the issuance of restraining orders and injunctions under the Sherman Act in labor dispute cases. And because of a suggestion made to Congress that certain judges had relied on Federal statutory provisions other than the Sherman Act as justifying the issuance of injunctions in labor dispute cases it was provided in the last clause of the second paragraph of sec. 20 that none of the specified acts listed in the paragraph should be considered or held to be in violation of *any* law of the United States—rather than merely in violation of the Sherman Act or the anti-trust laws generally. See 51 Cong. Rec., pp. 14365-14367.

The legislative history of the last clause of sec. 20 *supra* is extremely informative on this point. The Clayton Act was first introduced into and passed by the House of Representatives. As the Act went from the House of Representatives to the Senate, the present sec. 20 was sec. 18. At that time the language of the last clause was as follows:

nor shall any of the acts specified in this paragraph be considered or held to be unlawful.

The Senate Committee recommended that the word "unlawful" be eliminated and that the words "to be violations of

the anti-trust laws" be substituted. As so amended the language of the last clause would have been as follows:

nor shall any of the acts specified in this paragraph be considered or held to be violations of the anti-trust laws.

On the floor of the Senate an amendment was moved and adopted to substitute the words "any law of the United States" for the words "the anti-trust laws". By this amendment the final language was adopted, as follows:

nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

The debate on the floor of the Senate with respect to the language of the last clause clearly indicates the reasons for the changes. The important point is the reason given for eliminating the original language, to the effect that none of the acts specified in the paragraph should be considered or held to be "unlawful". It was pointed out that under the original language it might be held that none of the specified acts could be proscribed by state common law or state statutory law. It was pointed out that the first of the specified acts was "terminating any relation of employment", and that if the termination of any relation of employment was declared by Congress to be not unlawful generally, then it might be impossible for an employee to obtain redress in a state court in case an employer violated a contract of employment by discharging the employee contrary of the terms of the contract. The discussion, and the changes made in the language of the last clause, make it clear that the purpose of the last clause was merely to modify the substantive provisions of the Sherman Act (and of any other Federal statutes which might be affected), so that such provisions should not be deemed to prohibit any of the specified acts. See 51 Cong. Rec., pp. 14365-14367.

It was not intended by sec. 20 to prohibit injunctions in

labor dispute cases in state courts or in any way to modify substantive state law. The language of the last clause was changed so that a wrongful termination of a contract of employment could serve the basis of appropriate action in a state court, notwithstanding that the first of the specified acts was "terminating any relation of employment". Numerous decisions in the United States Supreme Court and also decisions of state courts recognize the right of state courts to issue injunctions in labor dispute cases. See, for instance, *Milkwagon Drivers Union v. Meadowmoor Dairies*, (1941), 312 U. S. 287, 85 L. ed. 836; *Carpenters & Joiners Union v. Ritter's Cafe*, (1942), 315 U. S. 722, 738-739, 86 L. ed. 1143, 1153-4; *Weyerhaeuser Timber Co. v. Everett Dist. Council*, (1941), 11 Wash. 2d. 503, 119 Pac. 2d. 643; *Isolantite v. United Electrical Etc., Workers*, (1942), 132 N. J. Eq. 613, 29 Atl. 2d. 183; *Western Electric Co. v. Western Electric Employees Association*, (1946), 137 N. J. Eq. 489, 45 Atl. 2d. 695, and *U. S. Elec. Motors v. United E. R. & M. Workers*, (1946), 166 Pac. 2d. 921, Super. Ct. of Calif., L. A. Co. Moreover Congress itself acknowledged that the jurisdiction and powers of State courts in respect of labor disputes were unimpaired even by the NLGA. (See *infra*, pp. 90-92, Appendix D-8, pp. lxii-lxix).

The situation must be the same in a territory as in a state. When Congress provided that the Sherman Anti-Trust Act (and any other Federal statute) should not be deemed to prohibit "terminating any relation of employment", to take one example, it no more intended to eliminate the common law or statutory law of a territory with respect to rights and remedies for breach of contract than it intended to eliminate the common law or statutory law of a state with respect to similar rights and remedies.

As above stated the purpose of sec. 20 of the Clayton Act was to amend the Sherman Act. Similarly the purpose of sec. 4 of the NLGA was to amend the Sherman Act. This is all made clear by the opinion in the *Hutcheson* case, in

which it is stated in effect that the Sherman, the Clayton and the Norris-LaGuardia Acts must be considered together.

The Sherman Act prohibits combinations or conspiracies in restraint of trade or commerce. Sec. 20 and sec. 4 establish exceptions to such prohibitions. For example, the specified act listed in paragraph (h) of sec. 4 is "Agreeing with other persons to do or not to do any of the acts" specified in the previous paragraphs. Such agreements might, but for sec. 4, be held to be combinations or conspiracies in restraint of trade or commerce. Under sec. 4 they cannot be held to be combinations or conspiracies in restraint of trade or commerce.

The Sherman Act prohibits combinations or conspiracies in restraint of trade or commerce generally. Sec. 20 and sec. 4 provide that certain specified acts, even though they would otherwise constitute combinations or conspiracies in restraint of trade or commerce, cannot be held to be "violations of any law of the United States". The result is that such specified acts cannot be held to be violations of the Sherman Act. We are therefore dealing with a Federal law, the Sherman Act, and its exceptions. An exception to a Federal law limits the impact to that Federal law, but it does not affect local law whether state or territorial.

Sec. 1 of the Sherman Act (15 U.S.C. 1) prohibits combinations or conspiracies in restraint of trade or commerce among the several states or with foreign nations. Sec. 3 of the same act prohibits combinations or conspiracies in restraint of trade or commerce in any territory. The whole argument of appellants, to the effect that sec. 20 and sec. 4 operate as limitations on Territorial law, is based on the fact that sec. 3 of the Sherman Act prohibits combinations or conspiracies in restraint of trade within a territory.

The argument of appellants ignores the fact that we are dealing with the Sherman Act and exceptions to that Act. It is true that the Sherman Act is applicable to combinations or conspiracies in restraint of trade within a territory. But



the exceptions afforded by sec. 20 and sec. 4 merely provide that the Sherman Act, as applicable to combinations or conspiracies in restraint of trade within a territory, does not prohibit any of the specified acts listed in sec. 20 and sec. 4. If a petitioner in equity in a trial court alleges a violation of his common law rights, he is not relying on the Sherman Act as the source of his rights, and therefore it is immaterial that the scope of the Sherman Act is limited in labor disputes.

Appellants particularly rely on secs. 3 and 4 of the NLGA as conferring "substantive rights", which they allege to be (Op. Br. 76) :

(1) 'The right to be free from yellow-dog contracts which are made unenforceable and void as against public policy. (29 USCA 103) .

(2) In any labor dispute, as broadly defined in the Act, to do *singly and in concert* all the acts specifically enumerated in Sec. 104.

Since appellants have been either unable or unwilling to specify in their pleadings, assignments of error or elsewhere in the record, or even in their briefs, just what "substantive rights" they claim were infringed by the issuance of the temporary restraining order in this case it should not be necessary to further lengthen this brief by attempting to imagine what appellants have in mind and then answering the imagined contentions, especially since they are immaterial to the present issue (see ante, pp. 60-65) . However, we feel compelled, from an abundance of caution and the fact that we must put all of our argument in this answering brief, to discuss the subject in a general way.

The absurdity of the "substantive rights" contention in general can be clearly demonstrated by a few examples. Let us assume, for the purpose of the examples stated below, that paragraphs (e) and (f) of sec. 4 of the NLGA provide in effect that mass picketing having for its purpose the obstruc-

tion of ingress and egress does not constitute a violation of any law of the United States, including the Sherman Act.

Example 1: If such mass picketing is indulged in in Pennsylvania, with respect to an enterprise which is engaged in interstate commerce, and such mass picketing interferes with such interstate commerce, paragraphs (e) and (f) of sec. 4 prohibit such mass picketing from being held to be a combination or conspiracy in restraint of interstate commerce.

Example 2: If such mass picketing is indulged in in Hawaii, with respect to an enterprise which is engaged in interstate commerce, and such mass picketing interferes with such interstate commerce, paragraphs (e) and (f) of sec. 4 prohibit such mass picketing from being held to be a combination or conspiracy in restraint of interstate commerce.

Example 3: If such mass picketing is indulged in in Hawaii, with respect to an enterprise which is engaged only in commerce within the Territory, and such mass picketing interferes with such commerce within the Territory, paragraphs (e) and (f) of sec. 4 prohibit such mass picketing from being held to be a combination or conspiracy in restraint of commerce within the Territory.

But the fact that mass picketing having for its purpose to obstruct ingress and egress is not in violation of the Sherman Act as applied to commerce within the Territory does not mean that such mass picketing is not in violation of common law rights recognized by the Territory.

The fact that it is expressly provided that the Sherman Act or other Federal legislation does not prohibit certain specified acts does not mean that a state or a territory cannot prohibit such specified acts (subject of course to constitutional limitations). The Sherman Act might very well have been interpreted by the courts as not being applicable to labor combinations. (In fact the purpose of sec. 20 of the Clayton Act, and subsequently the purpose of the NLGA were to correct what were believed to be errors in the inter-

pretation of the Sherman Act by the courts.) If the Sherman Act has been interpreted as above suggested then there would have been no reason for the express provisions of sec. 20 of the Clayton Act. In such case the Federal law, i.e., the meaning of the Sherman Act, would be the same as it is now. But in such case certainly it would never be urged that the regulation of labor combinations is beyond the control of state or territorial power merely because such regulation is not covered by the Sherman Act. The situation, so far as state or territorial authority is concerned, cannot be different when the interpretation of the Sherman Act is corrected by the provisions of sec. 20 of the Clayton Act and the provisions of the NLGA than the situation would be if the Sherman Act had always been interpreted as not being applicable to labor relation and had not required correction.

Appellants refer to the fact that Congress, in the enactment of the Sherman Act, acted under its "plenary power" to legislate for the Territory of Hawaii, as well as under its power to regulate interstate and foreign commerce. (Op. Br. 60-64.) It is true that Congress has "plenary power" (subject to constitutional limitations) to legislate for the Territory of Hawaii; that Congress acted under such "plenary power" in providing that the Sherman Anti-Trust Act should prohibit combinations or conspiracies in restraint of trade within the Territory; and that Congress acted under such "plenary power" in establishing the exceptions to the Sherman Act stated in sec. 20 and sec. 4.

But Congress exercised such "plenary power" only with respect to the subject matter of the Sherman Act, i.e., combinations or conspiracies in restraint of trade or commerce within the Territory. Sec. 3 of the Sherman Act prohibits combinations or conspiracies in restraint of trade or commerce within the Territory generally. Sec. 20 (Clayton Act) and sec. 4 (NLGA) provide that certain specified acts, even though they might otherwise constitute combina-

tions or conspiracies in restraint of such trade or commerce, are not violations of the Sherman Act because they are not "violations of any law of the United States." Congress, by providing exceptions to the application of sec. 3 of the Sherman Act, cannot be deemed to have had any intent to do anything else. More specifically, Congress cannot be deemed to have had any intent to take away from the Territory its normal power with respect to matters which are not related to combinations or conspiracies in restraint of trade or commerce. See *Brown v. Coumanis*, 5 Cir. 1943, 135 F 2d. 163, 146 ALR 1241 in which the court held that the NLGA did not intend to put within the protection of the federal courts all labor disputes, and that its purpose was not to enlarge federal jurisdiction but in the matter of using injunctions to restrict it.

Where a Federal law applies in the Territory any exceptions to that Federal law limit the impact of that Federal law in its application in the Territory—but such exceptions do not restrict the power of the Territory with respect to matters of local law. The same is true whether the Federal law under consideration is the Sherman Act or any other Federal legislation.

An intent on the part of Congress thus to limit the normal police powers of the Territory is not lightly to be assumed. See decisions cited ante, pp. 23-26.

That the substantive provisions of sec. 20 operate only in the field of Federal law is assumed by the United States Supreme Court. In *Allen-Bradley Co. v. United States*, (1945) 325 U. S. 797, 807, 89 L. ed. 1939, 1947, the court referred to the specific acts listed in sec. 20 as having been declared by sec. 20 "not to be violations of Federal law."

It should be noted that the *Hutcheson* decision arose out of a criminal prosecution under the Sherman Act. Where, therefore, the decision refers to "allowable conduct", it means conduct which is not in violation of the Sherman

Act,—i.e., conduct which is excluded from the Sherman Act by reason of the provisions of sec. 20 and sec. 4.

It is a necessary conclusion therefore that, although sec. 20 and sec. 4 are applicable within the Territory as limitations on the effect in the Territory of the Sherman Act (and other Federal legislation), they are not applicable as limiting the Territorial government including the Territorial courts with respect to matters of local law.

We have already pointed out that if sec. 20 operates to limit the Territorial government including the Territorial courts, then “terminating any relation of employment” could not be in violation of Territorial law—with the result that in case any employer violated a contract of employment by discharging an employee contrary to the terms of the contract the employee would not be able to obtain redress in a Territorial court. We wish to point out two further examples of the unfortunate results which would follow if the position of appellants were accepted.

The first is illustrated by the decision of the United States Supreme Court in *Apex Hosiery Co. v. Leader*, (1940) 310 U. S. 469, 84 L. ed. 1311. The case involved a suit brought in a Federal District Court by a corporation against a labor organization and its officers to recover treble damages under the Sherman Act for alleged conspiracy in restraint of trade or commerce among the several states. The plaintiff was a corporation which operated a hosiery factory in Philadelphia. Most of its raw materials were shipped to it in interstate commerce and a substantial part of its products were sold in interstate commerce. In order to unionize the hosiery factory, the labor organization and its officers and members forcibly took possession of the factory and held it during a protracted “sit-down” strike, during which they injured and destroyed much of the factory equipment and machinery. The Supreme Court held that the plaintiff could not recover damages under the Sherman Act because the above described action of the

union and its officers and members did not involve any violation of the Sherman Act. The rule therefore is that where, in order to unionize a factory, a labor organization and its officers and members forcibly take possession of a factory and hold it during a "sit-down" strike and injure and destroy factory equipment and machinery—such acts cannot be considered or held to be violations of the Sherman Act.

Let us examine the effect in the Territory of the rule just stated—if the position of appellants is accepted. It is their position that the Sherman Act and its amendatory Acts are applicable within the Territory and therefore that any acts which are not in violation of the Sherman Act as amended by its amendatory Acts also cannot be in violation of Territorial law. They take this position with respect to the acts specified in sec. 20 of the Clayton Act and sec. 4 of the NLGA. But there cannot be any distinction between acts which are specified by statute to be not in violation of the Sherman Act and acts which are specified by the United States Supreme Court to be not in violation of the Sherman Act. If, under any theory of the exercise of "plenary power", the Sherman Act and its amendatory Acts operate to limit the Territorial government including the Territorial courts, they must do so as a whole—as interpreted by the Federal courts as well as interpreted by act of Congress. The effect of the decision in the *Apex Hosiery* case is the same as though the acts specified in sec. 20 and sec. 4 had in express terms included trespass in labor disputes and the injury and destruction of factory equipment and machinery in labor disputes. The opinion in the *Apex Hosiery* case recognized that such acts were illegal and that the plaintiff was entitled to redress in the courts of Pennsylvania for such illegal acts. But if the position of appellants is accepted then the same acts if committed in the Territory of Hawaii would not be illegal, because not in

violation of the Sherman Act as amended, and the victim would have no redress in the Territorial courts.

The second is illustrated by the decision of the United States Supreme Court in *United States v. Local 807*, (1942) 315 U. S. 521, 535-6, 86 L. ed. 1004, 1012. The *Local 807* case arose under the Federal Anti-Racketeering Act of 1934, (48, Stat. 979-980). (The act was amended out of existence in 1946, with the result that its provisions do not now appear in the United States Code). The Act provided in part as follows, in Sections 2 and 6 (*italic supplied*) :

2. Any person who, in connection with or in relation to any act in any way or in any degree affecting *trade or commerce* or any article or commodity moving or about to move in *trade or commerce*—

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, *not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or*

6. . . . *Provided*, That no court of the United States shall construe or apply any of the provisions of this Act in such manner as to impair, diminish, or in any manner affect the rights of bona-fide labor organizations in lawfully carrying out the legitimate objects thereof, *as such rights are expressed in existing statutes of the United States.*

Section 1 of the Act defined "trade or commerce" as including trade or commerce within the Territory of Hawaii. In this respect the language of sec. 1 of the Act is similar to the language of sec. 3 of the Sherman Act. In enacting the Act, Congress therefore acted under its "plenary power" to legislate for the Territory of Hawaii and other territories, as well as under its power to regulate interstate and foreign commerce—to the same extent as in enacting the Sherman Act and its amendatory Acts.

The *Local 807* case involved a criminal prosecution for alleged conspiracy to violate the Sherman Act and also for alleged conspiracy to violate sec. 2 (a) of the Federal Anti-Racketeering Act of 1934. The case arose out of the following facts: The members of a union of truck drivers operating in New York City were attempting to control the driving of trucks within the city. For this purpose they attempted to take over at the city limits the driving of trucks bringing merchandise to the city from points outside the city limits, including from points outside the State of New York. They also demanded and received payments from owners of such trucks of \$9.42 for each large truck and \$8.41 for each small truck, being the regular rates for a day's work in the city of driving and loading and unloading. In some instances they actually performed the work within the city, in return for the payments demanded and received. In other instances they received the payments demanded without rendering any services. There was sufficient evidence to warrant a finding that they used violence and threats to obtain the payments above referred to.

The defendants (the union and its officers and members) were convicted in the District Court of conspiracy to violate the Sherman Act and also of conspiracy to violate sec. 2 (a) of the Federal Anti-Racketeering Act of 1934. The Circuit Court of Appeals for the Second Circuit reversed the conviction under the Sherman Act, on the authority of the decision in the *Apex Hosiery* case, but affirmed the conviction under sec. 2(a) of the Anti-Racketeering Act of 1934. *United States v. Local 807*, (2 Cir., 1941) 118 F. 2d. 684. The only issue before the Supreme Court was as to the conviction under sec. 2 (a) of the Federal Anti-Racketeering Act of 1934. The Supreme Court reversed the conviction.

The Supreme Court held that the payments demanded as above set forth constituted "wages by a bona-fide employer to a bona-fide employee", within the meaning of sec. 2 (a). The Supreme Court also, (315 U. S. 535-536,



86 L. ed. 1012), referred to the provisions of sec. 6, safeguarding "the rights of bona-fide labor organizations in lawfully carrying out the legitimate objects thereof", and held that such rights of labor organizations included the acceptance of payments even where services are refused and even where force or threats are used. In this connection the court pointed out that the purpose of the Act was to reach the activities of predatory criminal gangs of the Kelly and Dillinger type and stated that the activities of the union and its members were "among those practices of labor unions which were intended to remain beyond its ban."

The Supreme Court pointed out however that the activities in question, although not in violation of the Federal Anti-Racketeering Act, were nevertheless not lawful. The opinion contains, (315 U. S. 536, 86 L. ed. 1012-3) the following:

This does not mean that such activities are beyond the reach of federal legislative control. Nor does it mean that they need go unpunished. The power of state and local authorities to punish acts of violence is beyond question. It is not diminished or affected by the circumstance that the violence may be the outgrowth of a labor dispute. The use of violence disclosed by this record is plainly subject to the ordinary criminal law.

The decision of the Court was that the use of violence and threats to collect wages was not in violation of the Federal Anti-Racketeering Act. The decision of the Supreme Court was furthermore that the use of violence and threats to collect wages was not in violation of *any other law of the United States*. This results from the rule that an indictment under one Federal statute will support a conviction under any Federal statute. See *Williams v. United States*, (1897) 168 U. S. 382, 42 L. ed. 509, and *United States v. Hutcheson*, 312 U. S. 219, 229, 85 L. ed. 788, 791).

We therefore had the following situation while the Fed-

eral Anti-Racketeering Act of 1934 was in force. Express exceptions to the scope of the Federal Anti-Racketeering Act of 1934 which were contained in sec. 2 (a) and in sec. 6 thereof (which exceptions are comparable to the exceptions to the scope of the Sherman Act which are contained in sec. 20 of the Clayton Act and sec. 4 of the NLGA) limited the scope of the Federal Anti-Racketeering Act so that nothing therein prohibited the use of violence and threats to collect wages. Similarly under the rule of the *Williams* and *Hutcheson* cases the use of violence and threats to collect wages was not in violation of *any law of the United States*.

Let us now examine the effect in the Territory of the rule of the *Local 807* case—if the position of appellants is accepted. Under their theory of the exercise by Congress of “plenary power,” the express exceptions in the Federal Anti-Racketeering Act to its scope would not only have limited the meaning and effect of the Act itself as applicable in the Territory but would also have limited the power of the Territory and of its courts—with the result that the use of violence and threats to collect wages could not be or become the subject of Territorial legislation or of litigation in the Territorial courts. This would be particularly true under their position, because the decision of the Supreme Court in the *Local 807* case involved a determination that the use of violence and threats to collect wages is not in violation of *any law of the United States*. We would therefore have the monstrous situation whereby violence and threats to collect wages would be in violation of the local law of New York (as pointed out by the Supreme Court in the *Local 807* decision) but would not be and could not be made in violation of the local law of Hawaii.

Of course the foregoing was not the true interpretation of the Federal Anti-Racketeering Act as applicable in Hawaii. Under the Act as applicable in Hawaii, the Act would not have been violated by the use of violence and threats to col-

lect wages in Hawaii in connection with local trade or commerce any more than it was violated by the use of violence and threats to collect wages in New York in connection with interstate trade or commerce. But the fact that such violence and threats in Hawaii would not have been in violation of the Act as applicable in Hawaii would not have meant that such violence and threats were not the legitimate subject of redress in the Territorial courts.

A similar situation exists with respect to the interpretation of sec. 20 of the Clayton Act and sec. 4 of the NLGA, as imposing specific limitations upon the scope of "any law of the United States". Under sec. 20 and sec. 4 no law of the United States would be violated by any action in Hawaii in "terminating any relation of employment" in Hawaii or in performing any other of the specified acts listed in sec. 20 and sec. 4. But such fact does not limit the local law of the Territory with respect to the specified acts and does not limit the powers of the Territorial courts in enforcing local law with respect to the specified acts.

It is the contention of appellants that if their position is not accepted then there will be a different Sherman Act and a different Clayton Act and a different Norris-LaGuardia Act in Hawaii than anywhere else in the United States. (Op. Br. 65-66, 81). Such is not the case. A difference would exist if appellants' position were accepted. In Pennsylvania, the local law including the local courts can deal with trespass in labor disputes and with injury and destruction of factory equipment and machinery in labor disputes. In any state the local law including the local courts can deal with unlawful picketing. In New York, local law including the local courts could during the existence of the Federal Anti-Racketeering Act of 1934 deal with the use of violence and threats to collect wages. Appellants would have the local law including the local courts in Hawaii helpless to deal with the foregoing.

It is our position that the impact of the substantive rights

under sec. 20 of the Clayton Act and sec. 4 of the NLGA are the same in the Territory as they are in a State. They operate as exceptions to the Federal Anti-Trust Act (and other Federal legislation) but do not restrict the powers of local governments including local courts in normal matters of local law. See, also, *Alesna v. Rice* (U.S.D.C. Haw., Dec. 4, 1947) quoted in Appendix C, p. xxi.

**C. The Term "Law of the United States" as Used in the Last Clause of Section 20 of the Clayton Act, not only has a Well-Defined Meaning Which Excludes Law of a Territory, but also, as Congress Itself Has Defined that Term with Particular Reference to Territories, Excludes the Law of a Territory.**

In support of their contention that the Norris-LaGuardia Act confers substantive rights, appellants rely upon the last clause of sec. 20 of the Clayton Act as construed in the *Hutcheson* case *in pari materia* with the Norris-LaGuardia Act, reading:

. . . nor shall any of the acts specified in this paragraph be considered or held to be violations of *any law of the United States*. (Emphasis added.)

We have already shown ante, pp. 69-71, that the history of this section conclusively indicates that it referred to Federal law, not territorial law. However, we will show also that the term "law of the United States" had a well-defined meaning both before and after the Clayton Act was passed, under the decisions of the Federal courts, and that this meaning excluded the law of a Territory.

**Decisions Defining "Law of the United States"**

In *Maxwell v. Fed. Gold & Copper Co.* (8 Cir., 1907) 155 F. 110, 112, a suit was brought by a citizen of Minnesota in a Federal district court in that State against a corporation organized under the laws of the Territory of Arizona, for conversion of stock. The district court ruled that there was no diversity of citizenship because the parties were not citizens of different States. To the contention, which the dis-

strict court had also denied, that the defendant was a corporation organized under the statutes of the Territory of Arizona, and that the laws of territories are "laws of the United States" because they are subject to nullification by Congress, and that, therefore, the case involved and arose under a "law of the United States" within the purview of the decisions in *Union Pac. Ry. Co. v. Myers*, (1885) 115 U. S. 1; 29 L. ed. 319; *Tex. & Pac. Ry. Co. v. Cox*, (1892) 145 U. S. 593, 36 L. ed. 829, and *U. S. Freehold, etc. Co. v. Gallegos*, (8 Cir., 1898) 89 F. 769, the Court of Appeals for the Second Circuit said:

... But the laws of the territories are not laws of the United States,

citing *Ex parte Moran* (8 Cir. 1906) 144 F. 594, 603; *Linford v. Ellison* (1894) 155 U. S. 503, 508, 39 L. ed. 239, 241; and *Maricopa & Phoenix Ry. v. Arizona* (1895) 156 U. S. 347, 351, 39 L. ed. 447, 448.

In *Union Pac. R. Co. v. Myers* cited in the *Maxwell* case supra, the court held that a suit brought in a State court against a corporation organized under a statute of the United States could be removed by such corporation to the Circuit Court of the United States on the ground among others that the fact that it was created by Act of Congress made the suit one of the "suits arising under the laws of the United States" within the meaning of the second section of the Act of Mar. 3, 1875. The same rule was reiterated in the *Cox* and *Gallegos* cases. If a law of a Territory was also a "law of the United States", the fact of such incorporation under a law of the Territory ought to have the same result. But it was held to the contrary, in the *Maxwell* case supra.

In *Ex parte Moran*, cited in the *Maxwell* case supra (8 Cir. 1906) 144 F. 594, where Moran applied to the Federal court for his release on habeas corpus, on the ground that the statutes of the Territory of Oklahoma had been violated in the drawing of the grand jury which indicted him and therefore his conviction was void, while assuming that,

if the objections had been seasonably made and the judgment reviewable on writ of error, there might have been a reversal, the court said, at page 603, in denying the writ:

. . . The grounds upon which a prisoner in jail may be discharged by the use of this writ are specified in sec. 753 of the Revised Statutes, and the only ones possibly applicable to this case are the petitioner "is in custody in violation of the constitution or of a law or treaty of the United States." No treaty is broken by his confinement. The laws of the Territory are not laws of the United States, and their violation or disregard in the selection of the grand jury and the trial upon an indictment found by disqualified jurors was not an infraction of any national law. . . .

It has even been held that an Act of Congress peculiarly local to the District of Columbia is not a "law of the United States" within the meaning of a Federal statute on appeals. Thus in *Amer. Security & Trust Co. v. Comrs. of D. C.* (1912) 224 U. S. 491, 56 L. ed. 856, where sec. 250 of the Judicial Code (since repealed) provided that any final judgment or decree of the Court of Appeals of the District of Columbia might be reviewed, etc., in certain cases, one of them being:

Third. In cases involving the construction or application of the Constitution of the United States, or the constitutionality of any law of the United States, . . .

the court held that, in view of the purpose of Congress to relieve the Supreme Court from indiscriminate appeals, a special law applicable locally to the District of Columbia only, was not a "law of the United States" within the meaning of the quoted clause. The same ruling was reiterated in *Wash. Alexandria & Mt. Vernon Ry. Co. v. Downey* (1915) 236 U. S. 190, 59 L. ed. 533, where a *general* law enacted by Congress intended to be applicable generally throughout the United States, but which had been held unconstitutional

as to all localities except the District of Columbia, was held to be thereby constituted a local law and not a "law of the United States" for purposes of appeal under sec. 250 of the Judicial Code *supra*.

Coming now to a case decided after the passage of both the Clayton and Norris-LaGuardia Acts, the case of *People of Puerto Rico v. Rubert Hermanos, Inc.* (1940) 309 U. S. 543, 84 L. ed. 916, is pertinent. It was there held that the provision of sec. 39 of the Organic Act of Puerto Rico restricting every corporation authorized to engage in agriculture to the ownership and control of not to exceed 500 acres of land, is not one of the "laws of the United States" within the purview of sec. 256 of the Judicial Code (28 USCA 371) which vests in the courts of the United States exclusive of the several states jurisdiction of all suits "for penalties and forfeitures incurred under the laws of the United States", so as to exclude from the jurisdiction of the Puerto Rican territorial courts proceedings against the corporation under a territorial statute providing remedies for violations of such restriction. Mr. Justice Frankfurter, in discussing the question, said (84 L. ed. 919-920) :

There remains for consideration an objection based on § 256 of the Judicial Code (28 U.S.C.A., § 671). That section vests in "courts of the United States exclusive of the courts of the several States" jurisdiction of all suits "for penalties and forfeitures incurred under the laws of the United States". Whether a law passed by Congress is a "law of the United States" depends on the meaning given to that phrase by its contents. A law for the District of Columbia, though enacted by Congress, was held to be not a "law of the United States" within the meaning of § 250 of the Judicial Code. *American Security and Trust Company vs. District of Columbia*, 224 U. S. 491. Likewise, we hold that § 39 of the Organic Act is not one of "laws of the United States" within the meaning of § 256. Sec. 39 is peculiarly concerned with local policy calling for local enforcement from which local courts should not be ex-

cluded by a statutory provision plainly designed for the protection of policies having general application throughout the United States.

If, therefore, the term "law of the United States" in a general Federal statute affecting jurisdiction or procedure of Federal courts, can at times be construed, as in the *American Security* and *Rubert Hermanos*, *supra*, not even to include Federal laws where the latter are peculiarly local to a Territory or the District of Columbia, the inclusion of laws of a Territory enacted by its local legislature in the operation of such a general statute without express and specific language to that effect would be pure judicial legislation. And accordingly, the Federal courts, as in the *Maxwell* and *Moran* cases, *supra*, have refused to so hold.

Where, therefore, sec. 20 of the *Clayton Act* provides that certain defined acts of persons involved in labor disputes shall not be "considered or held to be violations of any law of the United States", clearly, the substantive effect, if any, of such a general enactment, cannot be held to apply to purely local laws enacted by a Territorial legislature, or to the general or common law of the Territory as defined by its courts.

But it is not necessary even to resort to the foregoing decisions to prove the correctness of this proposition, as the next subtitle will show.

**Distinction between "Law of the United States" and "Law of Hawaii" or "Law of a Territory" Recognized Expressly by Federal Legislation, Including the Clayton and Sherman Acts, and the Hawaiian Organic Act.**

Congress itself has, by its own use of the term "law of the United States", excluded laws of a Territory from the purview of such a term. Thus, in the very definitions cited by appellants from the Clayton Act (Op. Br. 64) as well as in the Sherman Act, defining "person", Congress itself has dis-



criminated between the term "law of the United States" and "laws of a Territory".

The word "person", or "persons", wherever used in sections 1-7 and 15 of this title shall be deemed to include corporations and associations existing under or authorized by the *laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.*

Sherman Act, sec. 8; 15 USCA 7.

This distinction has been reinforced as lately as 1937, by the Act of Congress of Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693, amending sec. 1 of the Sherman Act (15 USCA 1), which now provides (emphasis added) :

Every contract, combination . . . is hereby declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal contracts . . . when contracts . . . of that description are lawful as applied to intrastate transactions, under any *statute, law* or public policy now or hereafter in effect in any *State, Territory*, or the District of Columbia . . . .

In the Clayton Act, also, sec. 20 of which (29 USCA 52) is relied upon so vehemently by appellants as conferring alleged substantive rights through the reasoning of the *Hutcheson* case, sec. 1 (now 15 USCA 12) provides, in its original form (emphasis added) :

The word "person" or "persons", wherever used in this Act, [which would include section 20, of course] shall be deemed to include corporations and associations existing under or authorized by the *laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.*

This demonstrates conclusively from the terms of the Clayton Act itself, that the law of a Territory is not included in the term "law of the United States" used in sec. 20.

More specifically, for express distinction between laws of

the United States and the Laws of Hawaii or of the Territory of Hawaii, we again refer the court to the Report of the Hawaiian Commission (Appendix B), remarks of Sens. Cullom and Morgan (Appendix D-1); also to the following sections of the Hawaiian Organic Act:

Sec. 1, defining "laws of Hawaii" (ante, p. 15); sec. 5, on the other hand, extending to Hawaii all "laws of the United States" not locally inapplicable (ante, p. 15); sec. 6, continuing in effect, with certain exceptions, the "laws of Hawaii" not inconsistent with the Constitution or "laws of the United States" (ante, p. 17); sec. 55, extending legislative power (which is nothing more than to make "laws of Hawaii") to the local legislature over all rightful subjects of legislation not inconsistent with the Constitution and "laws of the United States" locally applicable (ante, p. 18); sec. 81, continuing in effect, until the local legislature otherwise provides, the "laws of Hawaii" concerning the several courts and their jurisdiction and procedure (ante, p. 18); and sec. 83, continuing in effect, with certain qualifications, the "laws of Hawaii" relative to the judicial department (ante, p. 18).

In the face of the foregoing history of Hawaii and its Organic Act, the judicial construction of the term "law of the United States" to exclude law of a Territory, and the *express* recognition by Congress (not only in the Organic Act, but in the very Sherman and Clayton Acts upon whose terms appellants rely so insistently for their contention that the NLGA confers "substantive" rights) of the mutual exclusiveness of the terms "law of the United States" and "law" of a Territory—the argument as to such substantive rights evaporates completely.

**D. Section 20 of the Clayton Act (Other Than the Last Clause) and All of the NLGA Provisions Are Procedural Only and Congress Designedly Refrained from Legislating As to Substantive Rights...**

We have shown that by the last clause of section 20 of the Clayton Act as amended by implication by section 4 of the NLGA Congress merely created exceptions to the Sherman Anti-Trust Act, and that the existence of such exceptions is wholly immaterial in this case.

By the Sherman Act Congress in 1890 had created new substantive rights, operating in the field of interstate commerce, including, in a territory, intrastate commerce as well. In framing the NLGA Congress carefully considered whether it would (1) confine itself to a narrowing of (a) the Sherman Anti-Trust Act and (b) the jurisdiction and equity powers of federal courts in cases coming before them under the Sherman Act or under some other grounds of federal jurisdiction; or (2) attempt to create still further substantive rights, this time in the field of labor disputes, as a positive aid to labor (as distinguished from mere relief from the operation of existing federal laws), thereby *further increasing* federal jurisdiction over labor disputes, instead of limiting it.

Congress elected the first alternative and deliberately rejected the second. This is so clearly shown by the legislative history as to be beyond dispute. Apellants are endeavoring to have this court do what Congress decided not to do.

Congress decided not to adopt the second alternative, because of its fear of constitutional difficulties in the several states, particularly in view of the Tenth Amendment. We concede that these constitutional difficulties do not exist in a territory. Nevertheless, Congress was not thinking of the territories, was not legislating for them, and a different law cannot be framed by judicial legislation just because Congress, if it had been thinking of the territories and had been legislating for them, could have enacted a law along different lines for them—could have created new substantive rights in the field of labor disputes and could have further increased federal jurisdiction over labor disputes instead of limiting it.

Besides other excerpts quoted in this brief from the committee reports and debates on the Norris-LaGuardia Act, which without exception point to the Federal courts as the only ones under consideration and whose jurisdiction and powers were intended to be affected, we have set forth, with necessary explanatory remarks, in Appendix D-8, pp. lviii-lxix, other excerpts from or references to Prof. Frankfurter's writings and the committee reports and debates on, and the history of, the NLGA, all of which corroborate the same intent, and further clearly indicate that Congress deliberately drafted the Act as a procedural measure only and so intended it.

That Congress, by the NLGA, did not invade the field of substantive local law, and refrained from any attempt to enlarge the federal jurisdiction by placing labor disputes, as such, within the protection of the federal courts, has been recognized in the decisions.

In *Lauf v. Shinner* (1938) 303 U. S. 323, 327, 82 L. ed. 872, 876, the court per Roberts, J., said:

As the acts complained of occurred in Wisconsin the law of that State governs the substantive rights of the parties. But the power of the court to grant the relief prayed depends upon the jurisdiction conferred upon it by the statutes of the United States. (Emphasis added.)

The *Lauf* case was cited in *Brown v. Coumanis* (5 Cir. 1943) 135 F. 2d. 163, 146 A.L.R. 1241. In that case an employer brought suit for an injunction restraining defendants, a labor union and its members, who did not represent plaintiff's employees but who demanded that plaintiff sign a closed shop contract with the defendants, from interfering with the plaintiff's restaurant business. It was held that this case involved a labor dispute within the definition of the NLGA, but that such fact did not give the federal district court jurisdiction on the asserted ground that the action "arose under the laws of the United States". The court said

that the NLGA does not put within the protection of the federal courts all labor disputes—that the purpose of the NLGA

. . . is not to enlarge federal jurisdiction, but, in the matter of using injunctions, to restrict it. It extends and supplements the restrictions first imposed by Sec. 20 of the Clayton Act, 29 U.S.C.A. § 52; *United States v. Hutcheson*, 312 U.S. 219 . . . *Milk Wagon Drivers Union v. Lake Valley Farm Products*, 311 U.S. 91 . . . The language is everywhere negative—"No court of the United States . . . shall have jurisdiction". Secs. 101, 107, "No restraining order or injunctive relief shall be granted." Secs. 108, 109. It is argued that these negative provisions are followed by "except", or like provisions, which imply that jurisdiction is given and injunctive relief may be granted if the stated conditions are met. These conditions are mainly procedural, and do not enlarge the court's jurisdiction over controversies. The Norris-LaGuardia Act does not vest power in a court of the United States to do anything it could not previously have done. It merely denies power to do by injunction some things the courts had been doing. A suit does not arise under that Act because the petitioner asserts that the Act will affect its trial, and professes his willingness to conform to it. In order to generate this kind of federal jurisdiction a right or immunity created by the Constitution or laws of the United States must be an essential element of the plaintiff's cause of action".

*Brown v. Coumanis*, *supra*, disposes of appellants' contention that the federal courts have exclusive jurisdiction in labor disputes. (Op. Br. 89).

## CONCLUSION

Having demonstrated, as we believe, that the decision of the Territorial Supreme Court was correct on the only point actually involved and decided—namely, that a circuit court of the Territory is not a "court of the United States" within the purview of the Norris-LaGuardia Act, and that

therefore that Act was not applicable to the Second Circuit Court of the Territory which had jurisdiction to proceed as it did in the injunction suit with regard to which the writ of prohibition was sought—we respectfully submit that the decision of the court below should be affirmed.

Dated: Honolulu, T. H., this 10th day of December, 1947.

Respectfully submitted,

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*Attorney for Appellee,*  
*Maui Agricultural Company, Limited.*

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## **APPENDIX**





## APPENDIX A

(See Brief, pp. 2, 26)

### Sections of Territorial Statutes Relating to Jurisdiction, Powers and Procedure of Territorial Courts Referred to in Foregoing Brief.

#### CHAPTER 1.

##### COMMON LAW, STATUTES AND DEPOSITORIES.

Sec. 1. *Common law applies except when.* The common law of England, as ascertained by English and American decisions, is declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; *provided*, however, that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the Territory. [L. 1892, c. 57, s. 5; am. L. 1903, c. 32, s. 2; R. L. 1925, s. 1; R. L. 1935, s. 1.]

#### CHAPTER 188.

##### SUPREME COURT.

Sec. 9603. *Superintendence of inferior courts.* The supreme court shall have the general superintendence of all courts of inferior jurisdiction, to prevent and correct errors and abuses therein where no other remedy is expressly provided by law. [L. 1892, c. 57, s. 50; R. L. 1925, s. 2223; R. L. 1935, s. 3592.]

Sec. 9604. *Jurisdiction and powers.* The supreme court shall have appellate jurisdiction to hear and determine all questions of law, or of mixed law and fact, which shall be properly brought before it on exceptions, error or appeal duly perfected from any other court, judge, magistrate or tribunal, according to law, or by reservation of any circuit court or judge; and original jurisdiction in all questions arising under writs of error, certiorari, mandamus, prohibi-

tion and injunction directed to circuit courts, or to circuit judges, or to magistrates, or other judicial tribunals, and returnable before the supreme court. The supreme court and the several justices thereof in aid of the appellate jurisdiction of the court shall have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and all other writs necessary or proper to the complete exercise of the appellate jurisdiction of the court, and each of the justices shall have original jurisdiction and power to issue writs of habeas corpus and may make such writs returnable before himself or the supreme court or before any circuit court or any judge thereof. [L. 1892, c. 57, s. 51; R. L. 1925, s. 2224; R. L. 1935, s. 3593.]

Sec. 9605. *Same.* The supreme court and the several justices thereof shall have power to administer oaths and to issue or allow the issuance of writs of error, certiorari, mandamus, prohibition and injunction according to law, to circuit courts, circuit judges, district magistrates and other judicial tribunals and to parties litigant before such courts, judges, magistrates, and tribunals; all of which writs shall be returnable before the supreme court. [L. 1892, c. 57, s. 53; am. L. 1903, c. 32, s. 14; R. L. 1925, s. 2225; R. L. 1935, s. 3594.]

Sec. 9606. *Incidental powers.* The supreme court shall have power to compel the attendance of witnesses and the production of books, papers and accounts; to make and award all such judgments, decrees, orders and mandates; to issue all such executions and other processes, and to do all such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by law or for the promotion of justice in matters pending before it. [L. 1892, c. 57, s. 52; R. L. 1925, s. 2226; R. L. 1935, s. 3595.]

## CHAPTER 189.

### CIRCUIT COURTS.

#### JURISDICTION AND POWERS; VENUE.

Sec. 9647. *Circuit courts.* The several circuit courts shall have jurisdiction, subject to appeal and exceptions to the supreme court according to law, as follows:

1. Of all criminal offenses cognizable under the laws of the Territory, committed within their respective circuits or transferred to them for trial by change of venue from some other circuit court;

2. Of all suits for penalties and forfeitures incurred under the laws of the Territory;

3. Of all causes, civil or criminal, that may properly come before them on appeal from any other court according to law;

4. At law, without jury, of all proceedings in, or in the nature of, quo warranto, brought by or in the name of the public utilities commission, or the Territory, for the forfeiture of the franchise of any corporate body offending against the provisions of any law relating to such corporation, for misuser, for nonuser, for doing or committing any act or acts amounting to a surrender of its charter, and for exercising rights not conferred upon it;

5. Of all civil causes at law, except as otherwise expressly provided;

6. Any circuit court may, upon satisfactory proof that a fair and impartial trial cannot be had in any case pending in such court, and after the parties thereto shall have had opportunity to be heard, change the venue to some other circuit and order the record to be transferred thereto; *provided*, however, that any circuit court may, in its discretion, upon the consent of all the parties to any civil cause pending in such court, change the venue to some other circuit court and order the record to be transferred thereto. [L. 1892, c. 57, s. 36; am. L. 1903, c. 32, s. 10; am. L. 1921, c. 157, s. 1; R. L. 1925, s. 2247; R. L. 1935, s. 3643.]

Sec. 9648. *Circuit judges at chambers.* The judges of the several circuit courts shall have power at chambers within their respective jurisdictions, but subject to appeal to the circuit and supreme courts, according to law, as follows:

1. To hear and determine all matters in equity; [see cc. 294, 302-304, 306].

2. To hear and determine all matters of divorce, separation and annulment of marriage; [see c. 296].

3. To grant probate of wills, to appoint administrators and guardians, and to compel executors, administrators and guardians to perform their respective trusts and to account

in all respects for the discharge of their official duties; to remove any executor, administrator or guardian; to determine the heirs at law of deceased persons and to decree the distribution of intestate estates; [see cc. 290-292, 295, 305].

4. To admeasure dower and curtesy and partition real estate; when the dower or curtesy in real estate cannot be set apart without great injury to the owners, the judge may ascertain the value of such dower or curtesy in money, and order the same to be paid on such terms as shall be just and reasonable; when the partition of real estate cannot be made without great prejudice to the parties, the judge may order a sale of the premises and divide the proceeds; [see cc. 292, 304].

5. To legalize the adoption of children and to decree the affiliation of bastards; [see cc. 298, 299].

6. To select and impanel, subject to challenge for cause, by either party, a special jury of inquiry of idiocy, lunacy, or de ventre inspiciendo, or in any other matter to be tried before any of the judges at chambers, and they shall receive and act upon the verdict of such jury as equity and good conscience require; [see cc. 69, 195, 205, 233, 305].

7. To issue writs of habeas corpus according to law; [see c. 214].

8. To issue writs of error, certiorari, mandamus, prohibition and quo warranto, and all other writs and processes, according to law, to courts of inferior jurisdiction, to corporations and individuals, that shall be necessary to the furtherance of justice and the regular execution of the law; [see cc. 183, 211].

9. To enlarge on bail persons rightfully confined in all bailable cases; [see c. 231].

10. To require either the plaintiff or defendant, upon the application of the opposite party, to give *security for costs* in any civil cause, upon such terms and conditions as the judge shall deem just;

11. To issue warrants for the apprehension, in any part of the Territory, of any person accused under oath of a crime or misdemeanor committed in any part of the Territory and to examine and commit such person to prison according to law, for trial before the circuit court of the circuit in which the offense was committed, to fix bail and generally to per-

form the duties of a committing magistrate. [L. 1892, c. 57, s. 37; am. L. 1903, c. 32, s. 11; am. L. 1915, c. 99, s. 1; R. L. 1925, s. 2248; am. L. 1929, c. 18, s. 1; R. L. 1935, s. 3644.]

Sec. 9649. *At chambers, hearings without circuit.* Upon consent of all the parties who have appeared in any equity, probate or ex parte proceeding of any nature before any circuit judge in chambers, the circuit judge may in his discretion hold hearings in such proceeding, at which witnesses may be heard and evidence adduced and argument presented, at any place within the Territory without the boundaries of his circuit with the same effect as within the boundaries of his circuit, and for the purpose of such hearings may use the services of the clerk and reporter of the circuit court of the circuit within which such hearings are held, and may require stipulations between the parties as to the payment of costs of transportation and other special costs arising out of the fact that such hearings are held without the boundaries of his circuit as a condition of holding such hearings. [L. 1941, c. 243, s. 1.]

Sec. 9650. *No jury at chambers; exception.* Matters in the jurisdiction of judges of the circuit courts in chambers, as set forth in section 9648, shall be determined by the judge having jurisdiction thereof, without the intervention of a jury, except as provided in the sixth division of said section. [L. 1892, c. 57, s. 40; R. L. 1925, s. 2250; R. L. 1935, s. 3646.]

Sec. 9651. *Limitations. Provided,* however, that the power and jurisdiction of circuit courts and circuit judges in chambers relating to causes of a civil nature as defined in sections 9647-9648, shall be limited as follows:

1. Causes described in the second division of section 9647 shall be triable only in the circuit where it is alleged the penalty or forfeiture was incurred;

2. Actions of ejectment, actions to quiet title in real property and actions of trespass quare clausum fregit shall be triable only in the circuit in which the real property in question is situated;

3. Causes of divorce, separation, and nullity of marriage, shall be triable only in the circuit where the parties last lived together as man and wife, or, if they have not last so lived together in the Territory, in the circuit in which the applicant resides;

4. Proceedings for the probate of wills, for the appointment of administrators and trustees of the estates of deceased persons, for the admeasurement of dower and for all matters relating to the administration and settlement of estates of deceased persons, shall be brought only in the circuit where the deceased had his last domicile; *provided*, that if the deceased was last domiciled without the Territory, the proceedings may be brought in any circuit in which there is estate to be administered;

5. Proceedings for the appointment of guardians and for all matters concerning the relation of guardian and ward, shall be brought in the circuit in which the person or a majority of such persons are domiciled, in whose behalf such proceedings are begun; *provided*, that if such person is domiciled without the Territory, or a majority of such persons are so domiciled, the proceedings may be brought in any circuit in which there is estate of such person or persons;

6. Proceedings for the partition of real estate shall be brought only in the circuit where the real estate, partition of which is prayed for, is situated; *provided*, that if such real estate lies in more than one circuit the proceedings may be had in any circuit court in which the same or any part thereof is situated;

7. Proceedings for legalizing the adoption of children and decreeing the affiliation of bastards, shall be brought in the circuit in which the child, the parents, or either of them, of the children in question reside; *provided*, that if, in case of adoption, such parents are deceased or if neither of them resides within the Territory the proceedings may be brought in the circuit in which the adopting parent or parents or child reside;

8. The power of issuing writs of error and other writs specifically named in the eighth subdivision of section 9648 shall be in the judge of the circuit in which the alleged occasion for relief by any such writ shall arise; *provided*, however, that in case any such writ shall be necessary in the prosecution or furtherance of any cause or proceeding already begun or pending before any circuit court or judge, the power of issuing such writ shall be in the court or judge before whom such case or proceeding has been begun or is pending, even though the alleged occasion for relief shall

have arisen in another circuit. [L. 1892, c. 57, s. 38; am. L. 1898, c. 56, s. 1; am. L. 1903, c. 32, s. 12; R. L. 1925, s. 2249; R. L. 1935, s. 3645.]

Sec. 9652. *Circuit courts, powers.* The several circuit courts shall have power to compel the attendance of parties and witnesses from any part of the Territory, to compel the production of books, papers and accounts, to make and award all such judgments, decrees, orders and mandates, to issue all such executions and other processes, and to do all such other acts, and to take all other steps necessary to carry into full effect all the powers which are or may be given to them by law, or which may be necessary for the promotion of justice in matters pending before them. [L. 1892, c. 57, s. 42; R. L. 1925, s. 2251; R. L. 1935, s. 3647.]

Sec. 9653. *Circuit judges, powers.* The several circuit judges shall have power to administer oaths, and to compel the attendance of parties and witnesses from any part of the Territory, and the production of books, papers and accounts, to make and award all such judgments, decrees, orders and mandates, to issue all such executions and other processes, and to take all other steps necessary for the promotion of justice in matters pending before them in chambers, and to take all other steps necessary to carry into full effect all the powers which are or may be given them by law, in like manner as the circuit courts may do in term time. [L. 1892, c. 57, s. 43; R. L. 1925, s. 2252; R. L. 1935, s. 3648.]

## REPORTS AND RULES.

Sec. 9660. *Power to make and revise.* The judges of the several circuit courts, with the approval of the supreme court, shall have power to make, promulgate, and from time to time revise and amend rules for regulating the practice and conducting the business of the circuit courts and circuit judges at chambers of and in the several judicial circuits, in all matters not expressly provided by law; *provided* that in no case shall such rules purport to impose costs not expressly authorized by statute. [L. 1892, c. 57, s. 41; am. L. 1913, c. 40, s. 1; R. L. 1925, s. 2259; R. L. 1935, s. 3656.]

## CHAPTER 204.

## CIVIL ACTIONS, GENERALLY.

## RESTRAINING ORDERS.

Sec. 10050. *Petition; unliquidated demands.* In all cases contemplated by section 10033, the plaintiff may, according to circumstances, include in his petition, an allegation that the defendant is secreting his property, or disposing of the same, or colluding so to do, or is about to depart the Territory, or is damaging or wasting such property, and thereupon ask for process of attachment, or injunction, against the defendant, as such plaintiff may judge proper to ask in the premises. [C. C. 1859, s. 1117; R. L. 1925, s. 2333; R. L. 1935, s. 4068.]

Sec. 10051. *Same; ejectment.* In cases of ejectment, under section 10034, the plaintiff may, according to circumstances, allege in his petition, that there is danger that the defendant or some one for him, will commit destruction of tenements or other property, on the premises in controversy pendente lite, and thereupon ask for process of injunction, or other restraining process of the court, as such plaintiff may judge proper to ask. [C. C. 1859, s. 1119; R. L. 1925, s. 2334; R. L. 1935, s. 4069.]

Sec. 10052. *Allowance of restraining order; bond.* In every case in which process of constraint to the property of a defendant is prayed for, no such process shall issue until the plaintiff, or some one on his behalf, shall have filed a bond conditioned for the reimbursement to the defendant of all costs, charges and damages sustained by him in consequence of the suit, in case the plaintiff fail to sustain his action. Upon the filing of the petition and bond, any judge of the court at chambers may sanction a constraining writ, by indorsing thereon his written allowance, without which no executive judicial officer shall be justified in the seizure, attachment, removal, detention or injunction of his property, real or personal. [C. C. 1859, s. 1120; R. L. 1925, s. 2335; R. L. 1935, s. 4070.]

Sec. 10053. *Hearing before allowance.* If the judge deem it proper that the defendant, or any of several defendants,



should be heard before granting an injunction, he may grant an order requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may in the meantime be restrained. [C. C. 1859, s. 1121; R. L. 1925, s. 2336; R. L. 1935, s. 4071.]

## PROCESS.\*

Sec. 10057. *Summons returnable when.* In all actions commenced in the circuit courts the original summons shall be returnable to the term pending immediately after the expiration of twenty days after the service of summons; *provided*, however, if no term be pending at such time then the summons shall be returnable to the next succeeding term. [L. 1905, c. 8, s. 1; R. L. 1925, s. 2340; R. L. 1935, s. 4075.]

## CHAPTER 211.

### EXTRAORDINARY LEGAL REMEDIES.

#### PROHIBITION.

Sec. 10270. *Definition.* This is a mandate which issues in the name of the Territory from the supreme court, or from any justice thereof, or a circuit judge, directed to the judge and the party suing in any inferior court, forbidding them to proceed any further in the cause, on the ground that the cognizance of such cause does not belong to such court, or that the cause or some collateral matter arising therein is beyond its jurisdiction, or that it is not competent to decide it. [L. 1876, c. 39, s. 15; R. L. 1925, s. 2695; R. L. 1935, s. 4249.]

Sec. 10271. *Petition.* The defendant who applies for this writ shall apply by petition addressed to the justices of the supreme court, or to any single justice thereof, or to a circuit judge, stating the cause and nature of the action brought against him, and showing that the inferior court is not competent to try it, or that it has exceeded its jurisdiction in the trial or hearing of such action, which petition shall be verified by the oath of the applicant or by some person on

his behalf cognizant of the facts. [L. 1876, c. 39, s. 16; R. L. 1925, s. 2696; R. L. 1935, s. 4250.]

Sec. 10272. *Issuance of writ.* The court, justice, or judge, if sufficient ground is shown, shall issue an order forbidding the judge to take cognizance of the cause, and forbidding the plaintiff or party prosecuting to prosecute it further. [L. 1876, c. 39, s. 17; R. L. 1925, s. 2697; R. L. 1935, s. 4251.]

Sec. 10273. *Execution prohibited when.* If an inferior judge has rendered judgment in any of the cases before mentioned and the execution has issued, the order may be directed as well to the plaintiff or party prosecuting as to the officer charged with the execution, forbidding them to proceed in the execution in the same manner as if the prohibition had been addressed to the judge before issuing the execution. [L. 1876, c. 39, s. 20; R. L. 1925, s. 2700; R. L. 1935, s. 4252.]

Sec. 10274. *Service.* The order may be served in like manner as provided in section 10269 with respect to the writ of mandamus. [L. 1876, c. 39, s. 23; R. L. 1925, s. 2703; R. L. 1935, s. 4253.]

## ANSWER, PERPETUAL WRIT.

Sec. 10275. *Effect, if judge admits no jurisdiction.* When on being served with such order the inferior judge acknowledges he has no jurisdiction, he shall abstain from proceeding further in the case. [L. 1876, c. 39, s. 18; R. L. 1925, s. 2698; R. L. 1935, s. 4254.]

Sec. 10276. *Otherwise may answer; perpetual writ.* But if a judge, or the plaintiff or party prosecuting, shall believe the inferior court is competent, he or they may file a written answer to the order, after which the court or judge having jurisdiction shall pronounce summarily on the matter; and if the court or judge shall be of opinion that the applicant has made out his case, the prohibition shall be made perpetual, otherwise it or he shall allow the inferior judge to proceed to the trial and judgment of the case. [L. 1876, c. 39, s. 19; R. L. 1925, s. 2699; R. L. 1935, s. 4255.]

Sec. 10277. *Costs.* The costs shall be awarded to the parties according to the ultimate event of the application. [L. 1876, c. 39, s. 22; R. L. 1925, s. 2702.]

Sec. 10278. *Enforcement of writ.* If in contempt of the order the judge or the party shall proceed any further in the cause, the superior tribunal shall cause them to be arrested and shall punish them for such contempt, and the opposite party shall have an action for his damages against them. [L. 1876, c. 39, s. 24; R. L. 1925, s. 2704; R. L. 1935, s. 4257.]

## CHAPTER 244.

### CONTEMPTS.

Sec. 11140. *Defined; penalties.* Whoever, after trial by jury, is adjudged guilty of contempt of any court, whether by open resistance to the process or proceedings thereof, or of any judge or justice thereof in the lawful exercise of his judicial functions; or by insulting, contemptuous, contumelious, disrespectful or disorderly language, behavior or act, or breach of the peace, noise or other disturbance in the presence or hearing thereof when in session; or by wilful disobedience or neglect of any lawful process or order; or by refusing to be sworn as a witness, or when sworn, to answer any legal and proper interrogatories; or by publishing animadversions on the evidence or proceedings in a pending trial tending to prejudice the public respecting the same, and to obstruct and prevent the administration of justice; or by knowingly publishing an unfair report of the proceedings of a court, or malicious invectives against a court or jury tending to bring the court or jury, or the administration of justice into ridicule, contempt, discredit or odium, shall be punished by imprisonment not exceeding two years, or by fine not exceeding five hundred dollars; *provided*, however, that every judicial tribunal, acting as such, and every magistrate acting by authority of law in a judicial capacity, may summarily punish persons guilty of contempt as follows:

1. The supreme court or any justice thereof, by fine not exceeding one hundred dollars or imprisonment not exceeding sixty days, and not otherwise.

2. Any circuit court or circuit judge or board of registration, by fine not exceeding one hundred dollars or imprisonment not exceeding thirty days, and not otherwise.

3. Any district magistrate, any person acting in a judicial capacity by authority from a court of record, or any other person or tribunal having by law authority to punish for contempt, by fine not exceeding ten dollars or imprisonment not exceeding ten days, and not otherwise.

And when any person shall be committed to jail for the non-payment of any such fine he shall be discharged not later than the expiration of the time for which the court or judge or other person or tribunal imposing the fine could have sentenced him to imprisonment under the provisions of this section. [P. C. 1869, c. 29, s. 18; am. imp. L. 1872, c. 13, s. 1; am. L. 1903, c. 21, s. 1; R. L. 1925, s. 4326; R. L. 1935, s. 5740.]

Sec. 11141. *Refusal to perform act.* When the contempt consists in the omission or refusal to perform an act which is yet in the power of the party to perform, he may be imprisoned until he has performed it, and in that case the act shall be specified in the warrant of commitment. [P. C. 1869, c. 29, s. 20; R. L. 1925, s. 4327; R. L. 1935, s. 5741.]

Sec. 11142. *Publication of court proceedings.* The publication of proceedings before any court or judge, shall not be deemed to be contempt, nor shall the publication be punishable as contempt. [L. 1888, c. 42, s. 1; R. L. 1925, s. 4328; R. L. 1935, s. 5742.]

Sec. 11143. *Indictment.* Persons punished according to the provisions of section 11140 shall also be liable to indictment for the same misconduct, if it be an indictable offense; but the court before which a conviction is had on the indictment, in passing sentence, shall take into consideration the punishment before inflicted. [P. C. 1869, c. 29, s. 19; R. L. 1925, s. 4329; R. L. 1935, s. 5743.]

Sec. 11144. *Constructive contempts. Proceedings to review judgments for contempt.* Constructive contempts shall not be punishable as such except by the supreme court, the several circuit courts, and the justices and judges of said courts respectively at chambers. Whenever any person shall be adjudged guilty of any contempt or sentenced therefor, the particular circumstances of the offense shall be fully set forth in the judgment and in the order or warrant of commitment, and, on appeal, exceptions, writ of error, habeas

corpus or other proceedings for the review of the judgment, sentence or commitment, no presumption of law shall be made in support of the jurisdiction to render the judgment or pronounce the sentence or order the commitment. Every judgment, sentence or commitment for a civil contempt or for a constructive or indirect criminal contempt shall be subject to appeal, exceptions, writ of error or other proceeding for review as provided by law in other cases; *provided*, however, that on any appeal or other proceeding for review only questions of law shall be considered, and that nothing in this section contained shall be construed to prohibit the review of proceedings in any case of contempt, civil or criminal, direct or indirect, on habeas corpus or otherwise as heretofore allowed. [L. 1903, c. 21, s. 2; R. L. 1925, s. 4330; R. L. 1935, s. 5744.]

## TITLE 33:

### EQUITY.

## CHAPTER 302.

### EQUITY: JURISDICTION AND PROCEDURE.

Sec. 12401. *Circuit judges.* In addition to the jurisdiction in equity otherwise conferred, the several circuit judges shall have original and exclusive jurisdiction of every original process whether by bill, writ, petition or otherwise, in which relief in equity is prayed for, except when a different provision is made, and may issue all general and special writs and processes, required in proceedings in equity to courts of inferior jurisdiction, corporations and individuals when necessary to secure justice and equity. [L. 1878, c. 15, s. 1; R. L. 1925, s. 2462; R. L. 1935, s. 4700.]

Sec. 12402. *Same.* The several circuit judges may hear and determine in equity, all cases hereinafter mentioned, when the parties have not a plain, adequate and complete remedy at common law, that is to say:

1. Suits for redemption of mortgages or to foreclose the same.

2. Suits and proceedings for enforcing and regulating the execution of trusts, whether the trusts relate to real or personal estate.

3. Suits for the specific performance of contracts by and against either party to the contract and his heirs, devisees, executors, administrators and assigns.

4. Suits to compel the delivery of goods or chattels taken or detained from the owner and secreted or withheld so that the same cannot be replevied.

5. Suits for contributions by or between devisees, legatees or heirs, who are liable for the debts of a deceased testator or intestate and by or between any other persons respectively liable for the same debt or demand, when there is more than one person liable at the same time for such contribution.

6. Other cases in which there are more than two parties having distinct rights or interests which cannot be justly and definitely decided and adjusted in one action at the common law.

7. Suits between copartners, joint tenants and tenants in common, and their legal representatives, with authority to appoint receivers of rents and profits, and apportion and distribute the same to the discharge of incumbrances and liens on the estates or among the cotenants.

8. Suits between joint trustees, coexecutors and coadministrators, and their legal representatives.

9. Suits concerning waste and nuisance, whether relating to real or personal estate.

10. Suits upon accounts when the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action at law.

11. Bills by creditors to reach and apply in payment of a debt, any property, right, title, or interest, legal or equitable of a debtor, within the Territory, which cannot be come at to be attached or taken on execution in a suit at law, against such debtor.

12. Cases of fraud, and conveyances or transfers of real estate in the nature of mortgages.

13. Cases of accident or mistake.

14. Suits or bills of discovery, when a discovery may be lawfully required according to the course of proceedings in equity.

15. Suits for the determination and declaration of heirs of deceased persons.

16. And shall have full equity jurisdiction, according to the usage and practice of courts of equity in all other cases where there is not a plain, adequate and complete remedy at law. [L. 1878, c. 15, s. 2; R. L. 1925, s. 2463; am. L. 1927, c. 180, s. 1; R. L. 1935, s. 4701.]

## PROCEDURE.

Sec. 12403. *Sworn bill or petition, etc.* Suits in equity shall be commenced by sworn bill or petition according to the usual course of proceedings in equity, and shall be returnable on the rule days established by the judges. The material facts and circumstances shall be stated with brevity, omitting immaterial and irrelevant matters. [Laws 1878, c. 15, s. 3; R. L. 1925, s. 2466; R. L. 1935, s. 4703; am. L. 1941, c. 258, s. 1.]

Sec. 12404. *Additional parties; unknown parties.* Where a proceeding in equity involves or concerns any property, tangible or intangible, within the jurisdiction of the court, or any legal or equitable estate, right or interest, vested or contingent, in any such property, any person having or claiming to have any legal or equitable estate, right or interest, vested or contingent, in such property or any part thereof, or any lien or incumbrance upon or affecting such property, in whole or in part, or any inchoate right of dower, not joined as a party in the bill or petition as filed, may become a party by appearing and filing answer in such proceeding, or otherwise by intervention as the judge may allow, but in no case after judgment or decree has been given and filed in the records of the clerk of the court, and may by appropriate pleading set forth the estate, right or interest, vested or contingent, claimed in such property, or lien or incumbrance asserted against the same, or the inchoate right of dower, together with any defense against the bill or petition. All persons interested in any manner or

who may claim any interest in any such property, whose names are unknown to the petitioner, may be made parties to the suit by the name and description of unknown owners or claimants, who may be designated by fictitious names, and when their true names shall become known the same may be inserted as though correctly stated in the first instance. [C. C. 1859, s. 1228; am. L. 1921, c. 45, s. 1; R. L. 1925, s. 2470; R. L. 1935, s. 4704; am. L. 1941, c. 258, s. 2.]

Sec. 12405. *Process.* Upon the filing of such petition process may issue by the clerk of the court as in actions at law unless an injunction or other temporary order is prayed for, in which case the judge shall determine, *ex parte*, upon the property of granting such process, and in cases not demanding secrecy or occasioning doubt, the judge may, before issuing process, grant an order to show cause, and make any interlocutory order in the matter which may appear necessary to the ends of justice. [C. C. 1859, s. 1229; R. L. 1925, s. 2471; am. L. 1925, c. 208, s. 1; R. L. 1935, s. 4705.]

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## APPENDIX B

(See Brief, pp. 14, 90)

REPORT OF THE HAWAIIAN COMMISSION, APPOINTED IN PURSUANCE OF THE "JOINT RESOLUTION TO PROVIDE FOR ANNEXING THE HAWAIIAN ISLANDS TO THE UNITED STATES", APPROVED JULY 7, 1898; TOGETHER WITH A COPY OF THE CIVIL AND PENAL LAWS OF HAWAII.

(Document No. 16, 55th Cong., 3d. Sess.)

### REPORT OF THE COMMITTEE ON JUDICIARY

Hawaii having been hitherto a single independent State, its courts have exercised much of the jurisdiction by both the Federal and State courts in this country. In this respect the Hawaiian courts have resembled somewhat the courts of the Territories of the United States, which, as a rule, have had much Federal jurisdiction, as well as jurisdiction of cases arising under the Territorial laws. It seems very desirable in the case of Hawaii to separate these jurisdictions, leaving all cases arising under the laws of the Territory to the Territorial courts and transferring all jurisdiction of a Federal



nature to a district court of the United States to be established for the Territory of Hawaii. This district court should have also the jurisdiction of a circuit court of the United States.

There are many reasons which make this separation of jurisdictions desirable. The foreign shipping already calling at the ports of Hawaii, as well as the shipping from the United States, is very extensive and is rapidly increasing. With the natural growth of commerce on the Pacific, and especially in view of the change in the ownership of the Philippines, the near completion of the Siberian Railway, and the projected Nicaraguan Canal, the shipping that will call at the Hawaiian Islands will undoubtedly increase more rapidly in the future than it has increased in the past. This will give rise to many important admiralty cases in Hawaii, some of which may become matters of international interest.

It is obviously very desirable that jurisdiction over such cases should be exercised by Federal judges. Again, in the event of war, Hawaii may become a center for the trial of prize cases, of which the Federal courts should have exclusive jurisdiction. By making the relations between the territorial courts of Hawaii and the Federal courts, as to appeals, removal of causes, etc., the same as the corresponding relations between the State and Federal courts, all cases of a local nature can be tried and determined finally in the islands, and thus the expense and delay of bringing such cases to the mainland, and possibly to Washington, a distance of 5,000 miles, will be avoided.

Very little change need be made in the organization of the territorial or local judiciary. The organization and procedure of the Hawaiian courts is already very similar to what is found in the United States. This has been the result of a growth of sixty years of constitutional government in Hawaii under American influences. The judiciary department, unlike the executive and legislative departments, has always been free from politics. The people of Hawaii have great confidence in their judiciary, and have always looked to it as the one impregnable bulwark of their liberties. The last two sovereigns under the monarchy, who did so much to lower the standard of the executive and legislative departments, did not dare to encroach materially upon the judi-

ciary department until the final attempt of the Queen, which resulted in the loss of her throne.

The people of Hawaii of all classes, as shown by the memorials presented to the commission, desire the judiciary, as at present organized, to be retained with as little change as possible, with the exception that they generally deem it best that there should be a United States district court to take jurisdiction of Federal cases. The one change which it seems desirable to make in the local judiciary is the abolition of the racial and mixed juries. Hitherto in criminal cases foreigners have been tried by juries composed of foreigners, and Hawaiians by juries composed of Hawaiians, and civil cases, if between foreigners, have been tried by foreign juries; if between Hawaiians, by Hawaiian juries; if between foreigners and Hawaiians, by juries composed of an equal number of foreigners and Hawaiians.

It is now proposed to abolish these race and mixed juries and to require instead merely that juries shall be composed of citizens of the United States who understand the English language, without respect to color or blood. As the Hawaiians will become citizens of the United States and as most of them understand the English language, the greater portion of them will be competent to sit on juries. The requirement that they shall understand the English language is designed not to exclude the Hawaiians, but to avoid the expense and delay that would result if all proceedings had to be gone through in both languages through an interpreter.

The Hawaiian judiciary may be briefly described as follows:

There are three sets of courts—a supreme court, superior courts of record, and local courts—corresponding to the three classes of courts usually found elsewhere. They are called the supreme court, the circuit courts (five in number), and the district courts (twenty-nine in number).

The district courts sit without jury. They have jurisdiction in criminal cases, over misdemeanors, and in civil cases up to \$300 except in cases of slander, libel, malicious prosecution, false imprisonment, seduction, breach of promise of marriage, and cases involving title to real estate. The civil jurisdiction is exclusive up to \$50 and concurrent with that

of the circuit courts from \$50 to \$300. A general appeal lies in all cases, civil and criminal, to the circuit court, or an appeal solely on points of law may be taken to either the circuit or the supreme court.

The circuit courts sit with a jury, unless jury is waived, for the trial of most original law cases not begun in the district courts and in cases appealed from the district courts. The circuit judges sit without a jury in equity, admiralty, probate, and bankruptcy cases. Part of this jurisdiction will now be turned over to the United States district judge. There has as yet been no fusion of equity and law cases. Equity and law courts, as under the Federal system, are regarded as distinct, although presided over by the same judges. Exceptions lie from the circuit courts in law cases and general appeals in equity cases to the supreme court.

The supreme court consists of a chief justice and two associate justices. It hears appeals, exceptions, and writs of error from the circuit and district courts, and has original jurisdiction of contested-election cases, claims against the government, and the issuance of certain writs, such as habeas corpus, prohibition, mandamus, and certiorari. In case of the absence or disqualification of a justice, his place in any particular case may be filled by a circuit judge or member of the bar.

The chief justice and associate justices are appointed by the President (hereafter the governor), with the advice and consent of the Senate, and hold office, like the federal judges, during good behavior. The circuit judges are appointed in the same way and hold office for six years. The district judges are appointed by the President, with the approval of the cabinet (hereafter by the governor alone), and hold office for two years.

The chief justice and associate justices are all of American descent and are graduates of Eastern colleges and law schools. The circuit judges comprise two Americans, one Englishman, one Portuguese, and one Hawaiian. The district judges are mostly Hawaiians, but some of them are Americans and English.

There is a clerk of the judiciary department, with deputies, who are also clerks of the circuit courts. There are also

stenographers and interpreters. The executive officers of the courts are a marshal of the Republic (hereafter chief sheriff of the territory), sheriffs of the several circuits, deputy sheriffs of the several districts, and policemen.

The procedure in the various courts is much like that in the United States. The same is true of the laws administered by the courts. The statute law is largely copied from statutes (State or Federal) in the United States, and in the absence of statute law in a given case the common law is followed. American and English cases are cited, as in the United States. The supreme court law library contains over 5,000 volumes of well-selected law books.

There are also special courts for the trial of cases relating to private ways and water rights. These are presided over by "commissioners of private ways and water rights." These courts are of about the grade of district courts, but their jurisdiction is chiefly in the nature of equity jurisdiction. A general appeal lies from these commissioners to the supreme court.

There are two classes of lawyers, namely, those admitted to practice in all the courts and those admitted to practice in the lower courts only. The former are mostly Americans, but include a number of Hawaiians; the latter are mostly Hawaiians.

JNO. T. MORGAN.

W. F. FREAR.

APPENDIX C  
(See Brief, pp. 44, 84)

In the  
**United States Circuit Court of Appeals**  
for the District of Hawaii  
October Term, 1947

CONSTANCIO R. ALESNA, et al.,

*Plaintiffs,*

vs.

PHILIP L. RICE, as Judge of the  
Circuit Court of the Fifth Judicial Cir-  
cuit of the Territory of Hawaii; and  
C. NILS TAVARES, as Attorney Gen-  
eral of the Territory of Hawaii,

*Defendants.*

Civil No. 769

DECISION UPON MOTION FOR DETERMINATION  
OF DEFENSES IN ADVANCE OF TRIAL—  
F.R.C.P. 12 (d)

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Employers Council:

LIVINGSTON JENKS,

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FILED DEC. 4, 1947

at 10 o'clock and — minutes A. M.

Win. F. Thompson, Jr., Clerk

By (s) E. C. Robinson,

Deputy Clerk

DECISION UPON MOTION FOR DETERMINATION  
OF DEFENSES IN ADVANCE OF TRIAL—

F.R.C.P. 12 (d)

For a statement of the facts of this case which arises under the Civil Rights Act (28 U.S.C. Sec. 41 (14) ), grows out of the 1946 strike in the sugar industry of Hawaii, and involves a criminal contempt indictment pending in a Territorial Circuit Court, see its initial phase reported in 69 F. S. 897. This reference discloses that a preliminary injunction issued restraining the defendant Attorney General of the Territory from proceeding further with the prosecution of the plaintiffs for contempt of the Territorial Court.

As mentioned in the intervening case of *Hall, et al. vs. Hawaiian Pineapple Company, Ltd.*, 72 F. S. 533 at 536, the issues left in balance should have been determined earlier. However, with the criminal contempt proceeding in the Fifth Circuit Court held up by the preliminary injunction, the plaintiffs were not overly insistent upon proceeding to trial and therefore consented to the several extensions of time requested by the Territorial Attorney General's Office. When the case began, the then Attorney General was not prepared to reach the constitutional issues, for he was short of assistants and time as he was then serving the Territorial Legislature which was in session at that time. Thereafter, Mr. Tavares resigned as Attorney General and Miss Lewis took over control of the office. While she too directed the office with an inadequate number of assistants, the office in June became involved in the tense pineapple strike described in *Hall et al. vs. Hawaiian Pineapple Company* (supra). Accordingly, the court too being otherwise engaged, numerous stipulations extending time were approved. On July 21, 1947 the defendants filed their Answers. It may be here noted that incidentally as of this date, the Territory has a new Attorney General, though no formal request for substitution has been presented.

On July 22, 1947 the defendants filed this Motion under F.R.C.P. 12 (d), (28 U.S.C. following Sec. 723-c), and it was set for hearing August 26, 1947. Prior to that date, Mr. Jenks applied on behalf of the Hawaii Employers Council for permission to appear in the case as an *amicus curiae*. The application was resisted by the plaintiffs and favored by the defendants. The request was granted over objection August 11, 1947.

The oral arguments upon this Motion were extensive and when, due to interruptions, they were finally concluded on September 8, 1947, permission was granted to file briefs. On September 12, 1947, the plaintiffs filed a ninety-three page brief, the *amicus curiae* one of fifty-nine pages and the defendants a two-page memorandum. Until now other court business has prevented the complete digestion of these briefs.

The Motion presents for consideration six of the defenses set up in the Answer. Summarized these are as follows:

1. That the complaint fails to state a cause of action in that the plaintiffs have an adequate remedy in the criminal contempt prosecution in the Territorial Court as there all defenses could be asserted and the constitutional issues raised subject to a right of appeal to the Territorial Supreme Court and, if need be, from there to the U. S. Supreme Court.
2. That the Comity Statute—28 U.S.C. Sec. 379—denies this court jurisdiction of the complaint.
3. That this court has no jurisdiction to enjoin a Territorial Judge.
4. That such a judge is not a proper party defendant.
5. That the complaint fails to state a cause of action for equitable or any other relief, and
6. That even if the Territorial Court's Amended Restraining Order was void, it will support an indictment for contempt.

At the outset, the court posed for the parties consideration the correctness of its prior holdings that the Civil

Rights Act's remedies were available in Hawaii despite the fact that in conferring jurisdiction upon District Courts Congress omitted the word "Territory". Both agreed with the court that as the Act applies specifically to a Territory and confers upon one, whose civil rights secured by the Constitution and laws of the United States have been denied by another under color of the law of any Territory, a right to sue at law or in equity for redress (8 U.S.C. Sec. 43), jurisdiction exists in a legislative Federal court in a Territory and may be invoked by one in a proper case despite the fact that the Congress left out the word "Territory" in granting jurisdiction of such suits to United States District Courts.

In the light of the history, the objective and the wording of the whole Act, the word "state" appearing in 28 U.S.C. Sec. 41 (14) should not be narrowly interpreted. Indeed there is more reason under the Civil Rights Act to interpret liberally the word "state" to include "Territory" than to do likewise with reference to 28 U.S.C. Sec. 380 as has recently been done by a three-judge court sitting here in the case of *Mo Hock Ke Lok Po, et al. vs. Ingram M. Stainback, Governor, et al.*, Civil No. 765 (October 22, 1947). But see dissent by Denman, Circuit Judge. In that case it has been specifically held that Congress by not including the word "Territory" in 28 U.S.C. Sec. 41 (14) intended to leave such issues to litigation in Territorial courts unless the Federal jurisdictional amount was alleged. Perhaps that ruling is binding here. But, regardless, to hold that for the purposes of this Act, the word "state" does not include Territory would be to prevent the will of Congress having its effect in this part of the United States. Yet Congress intended to protect the Constitutional and Federal civil rights of all people everywhere in the nation. See *Screws vs. United States*, 325 U. S. 91, 98 (1945). Since 1900 Hawaii has been an incorporated part of the United States, and the Federal rights of its people are not a single iota less valuable than are those



of the inhabitants of a state. (See 48 U.S.C. Sec. 491 et seq.) Having created the right, having given this legislative court the jurisdiction of a "court of the United States" (48 U.S.C. Sec. 641 et seq.), and having made applicable to the two incorporated Territories the criminal provisions of the Act, (18 U.S.C. Sections 51, 52) there is no insurmountable obstacle to making effective by judicial action the granted civil remedy in a Territory for such an important right and thus curing what seems to be an oversight or an imperfection in the statute. *Keifer & Keifer vs. Reconstruction Finance Corporation*, 306 U. S. 381, 389 (1939); *Texas & N. O. R. Railway Co. vs. Railway Clerks*, 281 U. S. 548, 568 (1930).

Before reaching the defendants' Motion, counsel for plaintiffs suggested that the court had no jurisdiction to entertain it as the defendants had not appealed from the Order granting the preliminary injunction. (28 U.S.C. Sec. 227). Having resisted issuance of the preliminary injunction, plaintiffs argue that defendants cannot be heard again upon the same or similar questions of law, and that the only thing remaining to be done is to proceed to trial. The Court ruled against plaintiffs because it believed, amongst other reasons, that the constitutional issues had not been examined adequately heretofore on account of the Attorney General's reluctance in February to reach them in his argument upon the prayer for a preliminary injunction. The Statute permitting appeals from interlocutory decrees granting preliminary injunctions does not require a party to appeal at that time. He may, at his option, await the final decree and raise all questions by appealing from it. *Victor Talking Machine Company vs. George*, 105 F. (2) 697-C.C.A. 3rd (1939). That being so, there is no rule of law which prohibits a party defendant from taking advantage of F.R. C.P. 12 (d) in the absence of an Order of the Court deferring consideration of the defenses in point of law until trial. No such order was made here for the essential facts

necessary to a consideration of the questions of law are amply set forth in the voluminous pleadings.

Attached to the defendants' Answer, incorporated as a part thereof, are two lengthy exhibits. These exhibits constitute the complete record of all that transpired in the Fifth Circuit Court of the Territory from the date the Lihue Plantation Company applied for equitable relief until the court, upon its own Motion, amended its Restraining Order. Soon after the defendants' Answer was filed, plaintiffs moved to strike paragraphs V and XXIV of the Answer of which these exhibits were made a part on the grounds of redundancy, impertinency, and immateriality. During the course of argument upon this Rule 12 (d) Motion, a question arose as to whether or not this court could consider these exhibits to see the basis for the Territorial Court's issuance of its Amended Restraining Order issued by Judge Rice. Plaintiffs argue that it is improper to look behind the Order and besides it is void on its face.

If need be, the court may consider the exhibits attached to and made part of the pleadings of both parties. Together they reveal every step taken in the Territorial Court and are either certified copies (defendants) or copies thereof (plaintiffs). On the other hand, if those attached to the Answer be deemed improper pleading, the defendants' Motion that the court consider them in connection with the Rule 12 (d) Motion transforms that into a "speaking Motion" countenanced by the Federal Rules of Civil Procedure. See Rule 12 (b) and notes thereunder. See also *Samara vs. United States*, 129 F. (2) 594 at 597, C.C.A. 2nd (1942); *Gallup vs. Caldwell*, 120 F. (2) 90 at 92, C.C.A. 3rd (1941); and Rule 12 (b) with approved amendment. The Certificate of the Clerk of the Territorial Court provides here even a better guarantee of factual certainty than an affidavit. In any event, with a certified record of all steps taken in the Territorial Court attached to the pleading, to consider them under Rule 12 (b) as transposing the pending Motion into

one for Summary Judgment under Rule 56 would be an act of judicial economy. What did happen in the Territorial Court is beyond all dispute but the technical point that allegations in an Answer are deemed denied. But this point is irrelevant to a speaking Motion. There is before this court a reliable record of everything the Territorial Court did and said, including argument of counsel, affidavits and the evidence of witnesses who testified. This court may consider that record if need be in disposing of the Motion.

Plaintiffs' pending Motion to Strike those parts of defendants' Answer may also be taken as hereby denied.

With preliminary technicalities disposed of, we come to a consideration of the major contentions of law.

As indicated to counsel during oral argument, the court adheres to its former rulings that the Norris-LaGuardia Act, 29 U.S.C. Sec. 101 et seq., does not apply to the courts of the Territory. Nor does it give this Federal Court exclusive jurisdiction to issue in the Territory injunctions in labor disputes in consonance with the terms of the Norris-LaGuardia Act. See *Alesna, et al. vs. Rice, et al.*, and *Hall, et al. vs. Hawaiian Pineapple Company*, (both supra).

In the Pineapple case, it was stated that under the decision in *United States vs. Hutcheson*, 312 U. S. 219 (1941), the rights of labor set forth in Sec. 20 of the Clayton Act, 29 U.S.C. Sec. 52, and Sec. 4 of the Norris-LaGuardia Act, 29 U.S.C. Sec. 104, have been federalized as substantive rights, and that those substantive rights are binding upon the Territory. When re-examined, at the suggestion of both counsel, the statement is found to be inaccurate as it is too broad and general. To the extent that the rights enumerated in the Clayton and Norris-LaGuardia Acts coincide with rights guaranteed by the First Amendment to the Constitution, they are, of course, binding upon the Territory. Beyond that they are not binding upon the Territory any more than they are upon a state—which is not at all—for both Acts are limitations upon, and only upon, the Federal Government

and its courts. Both Acts were passed to correct judicial interpretations making applicable to labor organizations and activities the Sherman Anti-Trust Act. By what is thought was clear legislation, Congress has twice notified the courts that labor organizations and activities are exempt from the Sherman Act, *Wilson & Co. vs. Birl*, 105 F. (2) 948 at 952, C.C.A. 3rd (1939). In the Clayton Act, Sec. 20, Congress disclosed that none of the specified Acts shall be "held to be violations of any law of the United States." The history of this phase reveals that originally, as it came to the Senate from the House, the wording was "nor shall any of the Acts specified in this paragraph be considered or held to be violations of the Anti-Trust laws." Upon the Senate floor, the present wording of Sec. 20 was adopted and from the discussions it is apparent that the intent was to modify the Sherman Act and any other Federal statute which might have a bearing thereon. See Congressional Record, 63rd Congress, 2nd Session, Vol. 51, Part 14, pages 14365-14367. In any event, the limitations were upon the Federal Government, and not an invasion of the rights of the states. And as also before noted, there is nothing in either the Clayton Act or the Norris-LaGuardia Act which under the doctrine of the *Hutcheson* case must be construed together with the Sherman Act as a single piece of integrated legislation—which evidences an intention by Congress to decrease, as it could have, the measure of domestic power which it had in 1900 given the Territory of Hawaii. A limitation upon the broad domestic powers previously given the Territory is not presumed. *Puerto Rico vs. Shell Co. (P.R.) Limited, et al.*, 302 U. S. 253, at 260-263 (1937), *Inter-Island Steam Navigation Co. vs. Territory of Hawaii*, 305 U. S. 306 at 312 (1938), *Kawananakoa vs. Polyblank*, 205 U. S. 349 at 353 (1907), and *Yerian vs. Territory of Hawaii*, 130 F. (2) 786, C.C.A. 9th (1942).

That the Clayton and Norris-LaGuardia Acts are limitations upon Federal law only is to be noted in the decisions

of the Supreme Court in *Allen-Bradley Co. vs. Board*, 315 U. S. 740 at 748 (1942) and *Apex Hosiery Co. vs. Leader*, 310 U. S. 469 (1940).

With all prior rulings in this case adhered to—including the propriety of the circuit court judge being a party defendant, *Picking et al. vs. Pennsylvania R. R. Co.*, 151 F. (2) 240 at 250, C.C.A. 3rd (1945)—thus once again disposing adversely to the defendants of their first four contentions, with the generalization in the Pineapple case clarified, we reach the two points which in issuing the preliminary injunction, the court stated would need further examination. *Alesna vs. Rice*, 69 F. S. 897 at 901.

The questions specifically are: Did Judge Rice's Amended Restraining Order violate plaintiffs' rights, guaranteed by the First Amendment (1) to freedom of speech and (2) to assemble peaceably?

Before touching these delicate and important questions, it may be well to restate that where the constitutional rights of individuals are at stake, a Federal Court has a peculiar duty to step in, in a proper case, and if need be protect the individual against a threatened unjustifiable exercise of the power of a state or Territory. The adequacy of an opportunity to become a defendant in a criminal case and to then raise the same question of law before a court also bound by the Constitution is questionable. As Borchard points out, it is not at all a remedy. It is a hazard. See "Challenging Penal Statutes", Edwin Borchard, 52 Yale L. J. 445 at 461. True such has often been assigned as a reason for declining to act, but it is not an impressive one, at least in a First Amendment case. See *Douglas vs. Jeannette*, 319 U. S. 161 (1943). Where vital human liberties protected by the First Amendment, as distinguished from property rights, are at stake and are on the verge of possibly being crushed by the power of the State or Territory, a Federal court in a case alleging unusual circumstances is justified in acting despite the availability of a remedy later in the State or Territorial

courts. The motivating philosophy in cases such as this has been well expressed in *Stapleton vs. Mitchell*, 60 F. S. 51, where at p. 55 the court said:

“In sum, it seems fairly plain that although the state courts are the preferable forum for the adjudication of the question whether a state statute offends against the Federal Constitution on the theory that state courts equally with the Federal courts are charged with the duty of safeguarding constitutional rights, and since they are the sole judge of the meaning and import of a state statute they should be the first judge of whether state law transcends rights protected by the Federal Constitution. But, where as here, fundamental human liberties are drawn in issue, the Federal courts are a proper forum for the determination of the question whether a state statute trespasses upon an area which the Federal Constitution has set apart as hallowed grounds for expression of democratic ideas. We yet like to believe that wherever the Federal Courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.”

The plaintiffs have been indicted for criminal contempt. The Territorial law defines criminal contempt as a felony but also gives the court power to punish contempt summarily, R.L. of H. 1945, Sec. 11140. In the many years that this law has been in effect, this is said to be the first time that a Territorial judge, instead of using his summary powers, referred the matter to the grand jury. The indictment charges plaintiffs with being in contempt in that—

1. They picketed in mass at a designated time and place for the purpose of obstructing and interfering with ingress to or egress from the Lihue Plantation Company's property by its employees, and others lawfully seeking to enter or leave the company's property; and that

2. They picketed additionally at said time and place in groups of more than three at points of ingress and egress to the Company's property, and the pickets were not in motion nor at least ten feet apart,

all, it is charged, contrary to the terms of the Fifth Circuit Court's Amended Restraining Order.

The portions of this Amended Restraining Order which plaintiffs strenuously assert violated their constitutional rights to freedom of speech and to assemble peaceably are to be found in Sec. 7 of the Restraining Order and its concluding "in furtherance" clause.

The defendants' position is—

1. That the plaintiffs have not stated a claim for relief. The decision of the court in *Hall vs. Hawaiian Pineapple Company*, supra, it is said disposes of the questions of law herein that what the Territorial Court did was in the exercise of its powers and the plaintiffs should present their defenses in the Territorial forum.

2. That upon the authority of *United States vs. United Mine Workers of America*, 330 U. S. 258 (1947), even if Judge Rice's Order was void, it still will support an indictment for contempt for such an Order must nevertheless be obeyed until set aside by orderly judicial processes.

3. That the First Amendment does not guarantee the right of mass picketing in order to prevent ingress and egress to property.

4. That Judge Rice's Order is not unreasonable, but it is designed to fit temporarily a particular situation, and in no way interferes with plaintiffs' right to assemble peaceably elsewhere than at points of ingress and egress to Company property.

The plaintiffs' numerous contentions are—

(a) Exceptional circumstances are alleged in that

(1) It is alleged that the defendants engaged in a course of conduct to oppress and intimidate plaintiffs and other working men in the Territory so that they would fear to exercise their rights.

(2) The plaintiffs have been singled out and selected for prosecution under a statute never before used, all pursuant to a plan to intimidate and coerce plaintiffs and others in the exercise of their rights. That plaintiffs were singled out for prosecution because they were Union officers.

(3) The pendency of this criminal contempt case is an employer weapon to instill fear, spread confusion and weaken the Union's and plaintiffs' rights.

(4) Appeals would be costly and of no avail at least until the Ninth Circuit Court of Appeals was reached as the Supreme Court of the Territory in *I. L. W. U. vs. Wirtz*, 37 Haw. 404 (1946) has ruled adversely to plaintiffs' contentions concerning the Clayton and Norris-LaGuardia Acts.

(5) Here Judge Rice is the legislator, the wronged person, the prosecutor, and the executor.

(6) It is even claimed that it is contempt to violate a void Order.

(b) The decision in *Hall vs. Hawaiian Pineapple Company*, supra, does not control this case, for the reasons that

(1) This case is not moot. Special circumstances are alleged and plaintiffs are in peril of being unlawfully prosecuted for a felony.

(2) The Amended Restraining Order violates the First Amendment.

(3) The Fifth Circuit Court has already ruled adversely to plaintiffs' position on all substantive issues of Federal and constitutional law.

(4) If convicted, plaintiffs who are citizens will lose their civil rights and the non-citizens be barred from naturalization.

(c) The Amended Restraining Order violates substantive Federal rights under the Clayton and Norris-LaGuardia Acts.

(d) And finally—the only open issue here—that the Rice Order violates plaintiffs' constitutional rights as guaranteed by the First Amendment in that



(1) It constitutes unjustifiable previous restraint upon their rights of free speech and of assembly.

(2) It narrowly and unreasonably circumscribes these rights at the very time when they are of most value and does so without due regard for the size and scope of the industrial conflict involving 100,000 I.L.W.U. members, 12,000 acres of sugar cane land and twenty company towns and villages.

(3) The Order is vague, ambiguous, and confusing and places the risk of contempt unjustly upon the pickets to determine accurately just what it means, what are the points of ingress and egress, whether in any manner any act of theirs "otherwise" had the effect of accomplishing the prohibited acts, and that the "in furtherance" clause in the Order gives its specific prohibition a tentative quality. In short, it is claimed that it is not clear and explicit and unlawfully places the risk of non-obeyance upon men not to well versed in English, let alone the construction of legal language.

In support of their position that the Order violates their constitutional rights, the plaintiffs rely heavily upon—

*Whitney vs. California*, 274 U. S. 357 (1927).

*Herndon vs. Lowry*, 301 U. S. 242 (1937).

*Thornhill vs. Alabama*, 310 U. S. 88 (1940).

*Bridges vs. California*, 314 U. S. 252, 263 (1941).

*West Virginia State Board of Education vs. Barnette*, 319 U. S. 624, 638 (1943).

*Thomas vs. Collins*, 323 U. S. 516, 529 (1945).

*Marsh vs. Alabama*, 326 U. S. 501 (1946).

All cases attesting to the special place occupied by the liberties protected by the First Amendment concerning which in *Stapleton vs. Mitchell*, *supra*, Judge Huxman at p. 63, dissenting in part, well summarizes the current law as gathered from the Thomas case as follows—referring first to the usual rule that a statute is presumed to be constitutional—

"But it has no application when sacred constitutional guaranteed rights are involved. Then an entirely different principle must guide us. That is the conclusion

I draw from the decision of the Supreme Court in the Thomas case. The court points out that these constitutional guarantees have a sanctity and solemnity which is not accorded to general rights arising by operation of statutory law. When a regulation impinges one of these rights, it must not only be justified by a clear public interest and be passed to meet a clear and present danger to such right, but it must also be reasonable and must have a reasonable relation to the object sought to be accomplished. In such case, there is no presumption of constitutionality. There is rather a suspicion in the minds of the courts, the guardian of our constitutional liberties, and the burden is upon him who would uphold the interference with such rights to carry the burden of justifying the interference within the test laid down by the Supreme Court in the Thomas case. As stated by the Supreme Court, when the right to restrict the exercise of free speech is the subject of inquiry, it is our 'tradition to allow the widest room for discussion, the narrowest range for its restriction.' (323 U. S. 516, 65 S. Ct. 315, 323)."

The plaintiffs argue there was not only no clear and present danger to the public but further the restraint imposed is unreasonable. See *Thornhill vs. Alabama*, supra, *Carpenters & Joiners Union vs. Ritter's Cafe*, 315 U. S. 722, (1942), and *Thomas vs. Collins*, supra.

In the preliminary stage of this case, it was said that it appeared, subject to a later and fuller examination of the question of law based upon the Constitution that in view of the exceptional and unusual circumstances alleged that the plaintiffs had stated a claim for equitable relief. *Alesna vs. Rice*, at p. 901.

Is there, now that these questions of law have been examined in an atmosphere less tense than that existing in February, and in view of *Hall vs. Hawaiian Pineapple Company*, supra, any reason to alter the initial ruling?

I am inclined to believe that there is. It does not now appear to me that the plaintiffs' constitutional rights have been invaded by Judge Rice's Restraining Order.

It has already been decided, though to be sure plaintiffs do not agree, that the Territory has the same domestic powers as a state and may "take adequate steps to preserve the peace and protect the privacy, the lives and the property of its residents . . .", *A. F. of L. vs. Swing*, 312 U. S. 321 at 325 (1941). And this it may do by a statute narrowly drawn or by an injunction tailored to fit a specific situation.

Generally speaking, under normal circumstances, no state or Territory can prohibit one's full exercise of his Federal and constitutional rights. Because of Article 6 of the Constitution, the Territory could not, for example, make it a crime for labor to exercise in Hawaii its rights under the Constitution or any federal law any more than a state could. That is what was meant when heretofore the court remarked that the Clayton Act and the Norris-LaGuardia Act did not apply to the Territory "directly" but that Territorial statutes and injunctions must respect labor's Federal and constitutional rights. But like a state, the Territory may take steps to so regulate, without destroying, these rights of labor that the equally valuable rights of others will be safeguarded and peace and order maintained.

A general statutory restraint upon the liberties guaranteed by the First Amendment is not presumed constitutional but, as noted, is regarded by the courts with suspicion. *Stapleton vs. Mitchell*, *supra*.

But the same rule does not apply to specific injunctions. Restraints thereon by Orders of Courts are presumably valid unless obviously void on their face, for they are deemed to have been carefully drafted by the court to fit a particular situation.

Here, contrary to plaintiff's contentions, this Order is not void on its face and may, without resort to the evidence on which it is based, be deemed valid. Although the attack upon the Order is concentrated upon its paragraph (7) and its "in furtherance" clause, it is apparent from a reading of the whole Order that what is prohibited is not the lawful

but the unlawful. Omitting the preliminaries, the Order reads—

“WHEREFORE, you, ..... are hereby restrained and enjoined until the further order of this Court from in any way

(1) Obstructing or attempting to obstruct, by massing of pickets or otherwise, the ingress to or egress from the Petitioner's mill, store or other plantation buildings or premises located in the County of Kauai, Territory of Hawaii, of the Petitioner, its employees, or any others who may enter or desire to enter said premises for the purpose of performing work or for other lawful occasion;

(2) Obstructing or attempting to obstruct, by massing of pickets or otherwise, freedom of movement on or along the public or private roads or ways in or about the Petitioner's premises, of the Petitioner, its employees, or any other persons who may pass or desire to pass on or along said roads or ways for the purpose of performing work or for other lawful occasion;

(3) Obstructing or attempting to obstruct the free movement in, on or about the Petitioner's premises, of the Petitioner, its employees, or any other persons who may be in, on or about said premises for the purpose of performing work or for other lawful occasion;

(4) Threatening violence to, intimidating, or coercing, or attempting to intimidate or coerce, the employees of the Petitioner or those seeking employment with the Petitioner, or any persons who are lawfully upon the Petitioner's premises or are proceeding to or from said premises;

(5) Coercing or intimidating, or attempting to coerce or intimidate, employees of the Petitioner or those seeking employment with the Petitioner, by means of threats concerning the safety or welfare of the families of such employees or the families of those seeking employment with the Petitioner; or threatening violence to, or coercing or intimidating, or attempting to coerce or intimidate, such families;

(6) Without express written consent of the occupants thereof, visiting or being at or about the dwelling

houses or residence premises belonging to Petitioner and occupied by employees of or persons seeking employment with Petitioner and thereat being offensive, disorderly, threatening or intimidating (in words or actions) towards, and harassing, such occupants, or any of them;

(7) Mass picketing by assembling in compact groups or congregating in crowds on or near real property of the Petitioner, whether used for business or residence purposes, to thereby prevent or attempt to prevent or in any manner physically obstruct or interfere with ingress to or egress from said real property by Petitioner, any of its employees, or any other persons lawfully seeking to enter or leave any of said real property;

AND IN FURTHERANCE HEREOF, you are hereby ordered to limit the number of pickets which you shall use to not more than three (3) pickets in a group at any point and station when stationed at points of ingress to and egress from the Petitioner's property, provided, however, that any pickets in excess of three (3) at any one point and station, shall be in motion and, except when passing each other, shall maintain a distance of not less than ten (10) feet between each other and such picketing as shall be done by them shall not be violative of any of the preceding restrictive provisions hereof; all pickets being hereby enjoined from picketing other than in a peaceful and lawful manner and from obstructing the Petitioner, its employees, or any other persons lawfully seeking to enter or leave the Petitioner's premises; and all pickets being also enjoined from otherwise committing any of the acts hereinbefore prohibited. Any persons engaged in such picketing as is not hereby restricted or prohibited shall wear arm bands reading "Authorized Picket," or "U.P".

This Order, read without straining to find defects and ambiguities, is sufficiently clear and explicit as to what is prohibited to guide those affected if they gave it, as they must, a fair reading. And it was not necessary for the court to translate its directions into various foreign languages. If

such was necessary, that duty fell upon the Union, not the court.

This Order, intelligently read, in no way restrains plaintiff's rights to freedom of speech or of assembly. Indeed, it does not even prohibit mass picketing. It simply restrains mass picketing at readily ascertainable and customary points of ingress and egress when such type picketing is for the purpose of interfering with the equally valuable rights of others—owners, employees and other persons lawfully entitled to enter or leave the property unmolested. A mass of pickets in the hundreds at the gates of company property so as to prevent others lawfully entitled to enter or leave is obviously not an exercise of the freedom of utterance, but is an endeavor by a show of physical force to prevent others from having the full advantage of their constitutional rights. The right to picket may not be so exercised that by physical force or position the rights of non-strikers to work and the rights of property owners to protect and maintain and even operate their property is denied.

Under neither the Constitution nor any Federal law is conduct such as that prohibited by the Order immunized from state or Territorial regulation and it was only such conduct that Judge Rice prohibited. He might even, without interfering with the right to picket peacefully, have deemed the situation to have warranted the prohibition of all mass picketing, but he saw fit only to regulate it at certain places when and only when it was conducted for the purpose or had the effect of blocking ingress and egress.

As a further means of controlling such conduct and assuring others of the full enjoyment of their rights, without danger of physical combat, Judge Rice ordered that at the usual points of ingress and egress the pickets be limited to three and at all other picket points or stations if more than three pickets were used, that they be in motion and at least ten feet apart. Plaintiffs claim that this limitation is unreasonable, that apparently Judge Rice deemed two company but

three a crowd. Small though the number is, especially in view of the size of the strike, I cannot find it to be an unreasonable regulation, especially as a temporary measure. The obvious purpose of the regulation again clearly appears to be to secure for others an adequate opportunity to utilize their rights without fear or obstruction, and to that end the Order prohibits those enjoined from blocking public and private roads and ways. Nor is there merit in the argument that the Order in restraining the International Union as well as its local unit is too general. To be effective, all acting in concert had to be enjoined.

Not only is this Restraining Order not void on its face, but going in back of it, as we may, to the picture of the situation described to Judge Rice by the affidavits and the testimony of the witnesses he heard, it stands revealed that the allegations of the petition were sufficiently supported to warrant the utilization by him of his court's equity powers. Granted that it was an *ex parte* hearing, as allowed by Territorial statute, Ch. 302, R. L. H. (1945), it must still be remembered that this is a Temporary Restraining Order which at no time did plaintiffs or others restrained seek to have modified. They only attack the jurisdiction of the Territorial court. The situation made to appear to Judge Rice by affidavit and evidence was one of increasing tenseness lending reasonable credence to the belief that if things were allowed to continue, with ineffective police control, bloodshed might easily ensue. The described scene was one of mill and store entrances solidly blocked by hundreds of massed pickets preventing anyone from going in or out even for maintenance purposes, of plantation roads blocked, of homes picketed and families threatened, annoyed, and disturbed, and of a rising tempo of non-peace inducing language wherever pickets were assembled. When the record of the evidence presented to Judge Rice is read, it provides a further reason for holding his Order valid.

The Order in no way interferes with plaintiffs' or anyone else's right to assemble peaceably. It simply prohibits reasonably picketing in large numbers, or the assembly of numerous persons for the purpose of blocking entrances and exits, public and private roads and ways so that others may not exercise their rights without fear or obstruction. The right of those on strike to assemble in order to hold a meeting or to hear those who wished to speak is not inhibited so long as that right is not exercised in such a way as to deny to others their rights.

So it is that upon the facts alleged—facts incidentally which do not support plaintiffs' argument that a conspiracy to deny plaintiffs their rights and to single them out for prosecution in order to intimidate others has been alleged in the complaint, and also as these facts are amplified by defendants' speaking motion—I find in point of law that plaintiffs' constitutional rights have not been invaded by the Amended Restraining Order.

There being no genuine issues of fact remaining to be tried, summary judgment for the defendants may be entered.

In the light of this disposition of the case, it is unnecessary to rule upon the question of whether if void the Rice Order would nevertheless support an indictment for contempt on the strength of the recent Lewis case, *supra*. Though unnecessary to decide, it may be remarked that it appears that there is no basis here for an application of the doctrine of *Erie vs. Tompkins*, 304 U.S. 64 (1938), and *Waialua Agricultural Co. vs. Christian*, 305 U.S. 91 (1938), as this is not a diversity of citizenship case and involves no right dependent upon Territorial law. Whether or not the Territorial courts wish to change the Territorial law on the subject, as revealed by *Dole vs. Gear*, 14 H. 554 (1903), *Rose vs. Ashford*, 22 H. 469 (1915), and *Sakan vs. Ashford*, 23 H. 267 (1916), in the light of what for Federal courts the Supreme Court has decided in the Lewis case is not for this court to determine.



The Preliminary Injunction is dissolved and a judgment for defendants may be entered.

Dated at Honolulu, T. H., December 3, 1947.

J. FRANK McLAUGHLIN (Signed)  
Judge

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## APPENDIX D

### 1-8 Inclusive

#### D-1

(See Brief, pp. 15, 90)

### References to and Excerpts From Congressional Record Re Local Autonomy for Territorial Courts and Procedure.

MR. CULLOM . . . *We found a supreme court there, not to administer United States statutes, but to administer the laws of the Territory, which is preserved in the bill and which is in harmony, as we thought, with the general principles and interests of the Government of the United States as well as of that Territory.*

*The plan of the bill is to retain the legislature, the system of local courts, purely to administer Territorial statutes, and to provide a United States judge to administer the United States laws. . . . We believe there is no occasion for changing everything there simply because we can and because in the Territories here in our own country we have United States judges to administer Territorial statutes as well as United States statutes. We believe it is wise to allow the judges of the local courts there to have entire control and jurisdiction over the local statutes of the Territory and a United States judge to administer the United States laws. (Emphasis added.) (33 Cong. Rec. 1871).*

*. . . But the theory of this bill is that they have a supreme court, a circuit court, and other inferior courts, and there are appeals from one to another of the territorial courts, and those judges, either of the circuit or supreme court, have nothing to do with decisions on*

*other statutes than those local to the islands. They exist just as in a State. (Emphasis added.) (33 Cong. Rec. 1929).*

... I do not know that it is a matter of very great consequence whether those judges are appointed by the governor or by the President of the United States; but as we are *dealing with a settled community, a state, a government*, full of people, so far as it has gone—not a great number there yet—but there has been a *government established for a great many years; they have their system of courts, they have their system of law, they have their construction of statutes by their supreme court and circuit courts, and they are familiar with them, and they felt entirely satisfied with the system they have*, and it seemed to the commission and afterwards to the committee that *the less we interfered with them the better it was for the people there as well as for the United States generally.* . . .

*So we found the supreme court there doing business with just as much dignity, with just as much sense of honor and of duty, and apparently with just as much intelligence as the supreme court of the State of Illinois or of Connecticut, or of any other State. There was nothing in the establishment there in any way that the commission could see would justify us in uprooting the supreme court or the circuit courts of the islands and requiring the Government of the United States to meddle with them. So it was the conclusion of the commission and of the committee that as far as that was concerned we ought to leave that alone at present. (Emphasis added.) (33 Cong. Rec. 2025).*

MR. MORGAN . . . there are other circumstances which have been forced upon the attention of Congress hitherto, chiefly by the sparsity of an educated and trained population in the Territories which we have heretofore organized. Heretofore, up to the present time indeed, except, I believe, in the case of Alaska, we have conferred upon what they call the United States courts in the Territories—the same courts the Senator from Connecticut is now trying to put upon the island of Hawaii

—we have conferred' upon them the power to enforce the laws of the United States, assuming under the decisions of the Supreme Court that Congress as the supreme sovereign over the Territories has the right to combine the powers of the State government and the powers of the Federal Government in the appointment of judicial officers for the Territories. We have conferred upon them *the double duty, and sometimes the irreconcilable duty, of passing upon questions that arise in the Territories themselves, and which concern private interests entirely, combining them with questions that arise under the laws of the United States and are entirely different in their purposes and in the means of execution from the Territorial or local laws.* For instance, we have conferred upon those Territorial courts the power of admiralty in several cases.

Now what greater inconsistency can there be than that of a Territorial court exercising all of the local jurisdiction that belongs to a State court or county court or probate court or criminal court and uniting that with the jurisdiction conferred under the laws of the United States upon the district and circuit courts in admiralty? How are we to expect to find judges of sufficient breadth of learning, sufficient ability to manage these diverse and incongruous conditions? We have escaped heretofore for the reason that it has very seldom happened that our Territorial courts have been called upon to administer admiralty jurisdiction, but I can conceive of nothing more unseemly in legislation to provide judicial jurisdiction and officers than to place in the hands, for instance, of a circuit judge of the State of Alabama the power to determine and execute the laws of the United States in Alabama. If he can not do it properly in Alabama, if there are public reasons connected with the harmony of the judicial establishment why a circuit judge in Alabama can not exercise such power, how can we justify conferring double jurisdiction upon a Territorial court?

The Territorial court, under the decisions of the Supreme Court, derives from Congress, in view of its competent powers, *all of the rights of a circuit court of*

*Alabama or any other State, and also all of the rights, powers, and jurisdiction that belong to Federal courts. Those courts in practice have two dockets, one of which is for the disposal of cases that are local in their origin and in their effect—purely local litigation. The other docket relates to cases of the Government of the United States or cases in which the Government of the United States is involved. This committee, and the commission, also, having some idea about this matter, undertook to get rid of this incongruity, this unnecessary mixing of two jurisdictions in the mind of a man serving two masters upon the bench, and we first of all separated the local courts in Hawaii entirely from the courts of the United States, and gave to them that kind of local jurisdiction that a circuit or other court in a State possesses.*

*Then in order that the Government of the United States might have its rightful powers exercised judicially in the Hawaiian Islands, the committee recommended that a district court of the United States should be established in those islands having a jurisdiction that is unequivocal, that is plenary, that has been defined by statute and by judicial decisions so that there is no doubt or dispute about its powers at all, and that in that jurisdiction that judge, representing the Government of the United States, should preside in all cases where the laws and rights of the Government of the United States were involved.*

Now, is there any serious objection, is there any constitutional objection, can there be any objection in theory or in practice to establishing in the islands of Hawaii the two separate jurisdictions just as they exist in the States? . . . (Emphasis added.) (33 Cong. Rec. 2123-4) .

Similar sentiments are expressed in 33 Cong. Rec., by other Senators: Stewart (p. 1932-3) , Foraker (1933-4, 2133) , Cullom again (2189) , Morgan again (2191-4, 2398-2400) , Teller (2388-9, 2441) , Nelson (2397) .

In the debates in the House, on the same bill, the same views were expressed, Rep. Knox and Rep. Hamilton taking the leading part: See 33 Cong. Rec. 3771, 3801, 3859, and conference reports, pp. 4358, 4649, and 4733, the last mentioned one stating as follows:

The amendments to Section 86 in effect separate the Territorial from the Federal jurisdiction in courts of the Territory of Hawaii, as provided in the House bill, the provision for appeals from the supreme court of Hawaii to the ninth judicial circuit being stricken out and the jurisdiction of United States district and circuit courts is conferred upon the Federal court established.

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## APPENDIX D-2

(See Brief, p. 19)

### Laws Re Hawaiian Judiciary Continued in Effect by Organic Act.

These laws included CIVIL LAWS OF 1897, TITLE VIII, JUDICIARY DEPARTMENT, including provisions vesting the *judicial power* in the local courts (sec. 1105); adopting as the law of the Hawaiian Islands the common law of England as ascertained by English and American decisions (§ 1109, now R.L. 1945, § 1); providing for the jurisdiction and powers of district courts (ch. 79, now R.L. 1945, ch. 190); providing for the *jurisdiction and powers of circuit courts and circuit judges at chambers* (ch. 80, now R.L. 1945, ch. 189); giving to *circuit judges at chambers power "to hear and determine all matters in Equity"* (§ 1145, now R.L. 1945, § 9648); providing for the organization and powers of the local Supreme Court (ch. 81, now R.L. 1945, ch. 188), including the power to "*issue writs of . . . injunction . . .*" (§ 1166, now R.L. 1945, § 9605); prescribing civil procedure in district courts (ch. 85, now partly in R.L. 1945, ch. 203);

and *civil procedure in courts of record* (ch. 86, now R.L. 1945, ch. 204) ; allowing *issuance of injunctions and prescribing the conditions thereof* which required a bond in certain cases (§ 1235-7, now R.L. 1945, § 10050-10053) ; a chapter on evidence (ch. 91, now R.L. 1945, ch. 196) , a chapter on *equity, admiralty and probate jurisdiction* (ch. 97, now partly in ch. 302, R.L. 1945) , the admiralty provisions having been repealed by the Organic Act which gave such powers to the U. S. District Court for Hawaii as hereinafter stated; a provision allowing the equity judge to determine *ex parte* upon the propriety of granting the process prayed for, including injunctions as now amended (§ 1503, now R.L. 1945 § 12405) ; and a chapter of the Penal Code *regulating proceedings for contempt of court, and restricting the power of courts to punish for contempts so that, unless a trial by jury was had, in which case a maximum of two years imprisonment or \$500 fine could be imposed, the Supreme Court could not imprison more than 3 months or fine more than \$100, or both, and lower courts were even more drastically restricted* (Penal Laws 1897, § 257-262, now R.L. 1945, ch. 244, as amended) . It should particularly be noted that these restrictions last mentioned on the power to punish for contempts differed greatly from the then general provisions of Federal law applicable to Federal courts in general as to punishment for contempts, our local statutes being, in 1900, far more restrictive of those powers than the then Federal statutes, (See R.S. Secs. 718 to 725) , yet they were continued in effect by Congress subject to change by the *local legislature* (Org. Act, sec. 81, 48 U.S.C.A. 631) . Some of the most pertinent sections of the statutes above mentioned are printed in Appendix A to this brief.

## APPENDIX D-3

(See Brief, p. 26)

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**Sections of Hawaiian Organic Act and of Revised Laws of Hawaii which would be affected if NLGA held to apply to Territorial Circuit Courts.**

The following Organic Act provisions: § 6 (continuing in effect the "laws of Hawaii" not inconsistent with the Constitution or laws of the United States or of the Organic Act, subject to repeal or amendment by the local legislature or Congress), § 55 (granting to the local legislature power over "all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable"), § 81 (vesting the "judicial power of the Territory" in the supreme court, circuit courts, and such inferior courts as the legislature might from time to time establish, and continuing in effect the "laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure" except as in the Organic Act itself otherwise provided, and "until the legislature shall otherwise provide"), § 83 (continuing in force, subject to modification by Congress or the legislature, the "laws of Hawaii relative to the judicial department, including civil and criminal procedure" except as amended by the Organic Act), § 86 (providing for the same relationship between the "courts" of the United States" and the "courts of the Territory" as between the former and State courts), as those provisions have been followed, interpreted and given effect by Congress and the courts for the last 47 years (see ante, pp. 10-23), all granting the same autonomy, practically, as that of a State, to the local legislature and courts and laws respecting judicial jurisdiction and procedure: would be drastically and radically reversed by the construction of the NLGA contended for by appellants. There would certainly, there-

fore, be a "conflict" between those special statutory policies uniformly established and followed by Congress for half a century, and an NLGA that changed and reversed the same.

Contrary to the appellant's statement, there are numerous provisions of the Territorial laws which, either in their original form at the time the Organic Act continued them in effect, or in modified form as amended by the legislature, were in effect at the time the NLGA was passed, which conferred jurisdiction and powers and regulated procedure of the equity courts in issuing injunctions in labor cases. To be sure, they did not specifically mention labor disputes, but in their broad terms they included both labor dispute and other cases. Hence, the statement that there was no local statute regulating injunctions in labor disputes, is not true. See R.L. 1945, § 1 (adopting the common law for Hawaii with certain exceptions), § 9648 (providing that the circuit judges at chambers should have power "1. To hear and determine all matters in equity" and "8. To issue writs of error . . . and all other writs and processes, . . . to corporation and individuals, that shall be necessary to the furtherance of justice and the regular execution of the law"), § 9650 (providing that chambers matters with certain exceptions not material here "shall be determined by the judge having jurisdiction thereof, without the intervention of a jury"), § 9653 (giving circuit judges power to "make and award all such judgments, decrees, orders and mandates, to issue all such executions and other processes, and to take all other steps necessary for the promotion of justice. . . .", etc.), § 9660 (giving circuit judges, with the approval of the supreme court, power to make rules "for regulating the practice and conducting the business of the "circuit courts and circuit judges at chambers," etc.), § 12401 (giving to circuit judges, in addition to the jurisdiction in equity otherwise conferred, "original and exclusive jurisdiction of every original process whether by bill, writ, petition or



otherwise, in which relief in equity is prayed for," and power to "issue all general and special writs and processes, required in proceedings in equity to . . . corporations and individuals when necessary to secure justice and equity," which certainly includes power to issue injunctions), § 12402 (giving such judges . . . full equity jurisdiction, according to the usage and practice of courts of equity in all other cases where there is not a plain, adequate and complete remedy at law"), § 12403 (providing for suits in equity to be commenced by sworn bill or petition "according to the usual course of proceedings in equity" and to "be returnable on the rule days established by the judges"), § 12405 (providing that

Upon the filing of such petition process may issue by the clerk of the court as in actions at law *unless an injunction or other temporary order is prayed for, in which case the judge shall determine, ex parte*, upon the propriety of granting such process, and in cases not demanding secrecy or occasioning doubt, the judge may, before issuing process, grant an order to show cause, and make any interlocutory order in the matter which may appear necessary to the ends of justice."),

§ 10050 (providing for prayer for issuance by circuit courts of injunctions in suits for unliquidated demands) § 10052 (providing for bond in cases where "constraint to the property of a defendant is prayed for"), and § 10053 (providing for issuance of orders to show cause and that "the defendant may in the meantime be restrained"), and §§ 11140-11144, regulating the power of the local supreme, circuit, and district courts and judges, and other local tribunals to punish for contempts, which *do not require*, like the NLGA, jury trial for such contempts, but provide that, if the case is summarily tried the penalties shall not exceed certain stated maximums, the highest of which maximums are, for the supreme court or justices thereof, fine not exceeding \$100 or imprisonment not exceeding sixty days, and also provid-

ing that, in the case of a conviction after a jury trial, the maximum shall not exceed two years imprisonment, or fine of \$500.

All of these sections of local law (which are printed in Appendix A to this brief) in their general effect relate to and cover suits which might involve injunctions or restraining orders and jurisdiction and procedure in cases involving labor disputes. The construction of the NLGA contended for by appellants would, by implication, amend all or most of these local statutes, by restricting the general powers and jurisdiction granted by them whenever the case involved a labor dispute, an exception which does not now appear in any of such local statutes. This clearly disproves the statement of appellants to the effect that there are no local statutes dealing with injunctions in labor disputes and hence no conflict with the NLGA as construed by them to apply directly to territorial circuit courts. See, also, argument brief, pp. 46-7, as to amendatory effect by implication of sec. 10 of the NLGA, if appellants' contention prevails.

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## APPENDIX D-4

(See Brief, p. 47)

**Excerpts from congressional reports and debates indicating congressional intent to effectuate original purpose of Clayton Act.**

These are the same character of acts which Congress in section 20 of the Clayton Act of October 15, 1914, sought to restrict from the operation of injunctions, but because of the interpretations placed by the courts on this section of the Clayton Act, the restrictions as contained therein have become more or less valueless to labor, and this section is intended by more specific language to overcome the qualifying effects of the decisions of the courts in this respect. (H. Jud. Comm. Rept. No. 669, pp. 7-8, Referring to Section 4 of the Act).

Mr. *Beedy* . . . It is very clear to me that if the provisions of the Clayton Act, as originally written, had not been abused, we should never have been called upon to consider this so-called anti-injunction bill of the present day. (75 Cong. Rec. 5468).

Mr. *LaGuardia* . . . Gentlemen, there is one reason why this legislation is before Congress, . . . disobedience of the law on the part of a few *Federal* judges. If the courts had been satisfied to construe the law as enacted by Congress, there would not be any need of legislation of this kind. . . .

What happened? A few of these *Federal judges* . . . wilfully disobeyed the law; . . . I have spoken with many of my colleagues who have been on the bench of their respective States, and every one of them has told me of the terrible abuses existing in the *Federal courts* in labor disputes. (75 Cong. Rec. 5478). (Emphasis added.)

Mr. *McKeown* . . . This bill does nothing more or less than put into actual effect what the Congress did years ago when they passed the Clayton Act; that is to say, by a certain construction of the Supreme Court and *other Federal courts* they took out of that act the many safeguards that Congress had put in there, . . . (75 Cong. Rec. 5468).

To the same effect also are the remarks of Sen. Blaine (75 Cong. Rec. 4619), Sen. Wagner (Id. 4915), Rep. Celler (Id. 5488-9, 5505), and Rep. Schneider (Id. 5514).

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## APPENDIX D-5

(See Brief, p. 51)

**References to and excerpts from congressional reports and debates indicating Congress recognized constitutional limitations on power to restrict original jurisdiction of Supreme Court.**

Senator Blaine:

This bill is not a complete labor code. It does not set forth all of the laws applicable to injunctions in

labor disputes. It does not repeal the labor sections of the Clayton Act but *merely supplements these provisions* and clarifies the intent of Congress.

It is drawn upon the theory that Congress has authority to *define and limit the jurisdiction of the Federal courts, other than the original jurisdiction conferred upon the Supreme Court by the Constitution*. All *inferior Federal courts* are created by law and it is within the power of Congress to prescribe their jurisdiction. This power has heretofore been exercised on numerous occasions, and has often been recognized by the Supreme Court.

*Proceeding upon this theory*, this bill defines and limits and jurisdiction of the *Federal courts* in the issuance of injunctions in cases involving and growing out of labor disputes. . . . (75 Cong. Rec. pp. 4625-6).

Sen. Norris:

. . . I want to ask the Senator whether the minority contend that Congress does not have the right to take away from any Federal court, *except the Supreme Court of the United States*, any jurisdiction that the court may have? Would we not have the right to take it all away and abolish the court by statute? (75 Cong. Rec. p. 4682).

Rep. McKeown:

The great question has always been raised by constitutional lawyers who say that the Congress has no right to interfere with the Federal courts, because the right to issue an injunction is an inherent right granted by the Constitution of this country. Why, no such thing is the case. *There is only one constitutional court, and that is the Supreme Court of the United States. Every other court in this country is created by Congress and lives by reason of Congress*, and the jurisdiction of the Federal courts can be fixed and must be fixed by Congress. (75 Cong. Rec. p. 5486).

Rep. Garber:

Has Congress the power to legislate the limitations and procedure provided for in this bill? Section 1 of Article III of the Constitution provides—

The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.

This delegation of power to Congress carries with it the *power to define the jurisdiction of the inferior courts it creates*, to enlarge or limit that jurisdiction within constitutional limitations. This view is clearly expressed in the case of *Kline v. Burke Construction Co.* in Two hundred and sixtieth United States Reports at Page 234, as follows:

*Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the General Government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold, or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution.*

Surely the power that can create or abolish the courts can, within constitutional limitations, fix the jurisdiction of the courts. The restrictions, therefore, upon the administration of injunctive relief by the Federal courts are clearly within the power of Congress. (75 Cong. Rec. 5493).

Senate Report No. 163 of the Senate Judiciary Committee on the bill, at pages 10-11 of the report, states:

No one will seriously doubt the right of Congress, under the Constitution, to limit the jurisdiction of Federal courts. The jurisdiction, for instance, of the district courts of the United States is given by act of Congress. All the courts of the United States *except the Supreme Court* could be entirely abolished by act of Congress, and *while Congress could not give to these inferior courts jurisdiction greater than is provided by the Constitution, it could*, on the other hand, within the limits of the Constitution, *give to the inferior courts such jurisdiction as Congress in its wisdom deems just. It follows, also, that having given this jurisdiction, it*

can, by act of Congress, take away all or any part of it. This has been clearly held by the Supreme Court of the United States in *Myers v. United States* (272 U. S. 52). At page 130 the Supreme Court said:

“ . . . It is clear that the mere establishment of a Federal inferior court does not vest that court with all the judicial power of the United States as conferred in the second section of Article III but only that conferred by Congress specifically on the particular court. . . . ”

In an earlier case the Supreme Court held:

*The judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. (Cary v. Curtis, 3 How. 235 (U. S.) at 244).*

In a fairly recent case, the Supreme Court, construing the power of the *inferior Federal courts* to exercise jurisdiction over controversies between citizens of different States, pointed out that:

The right of a litigant to maintain an action in a Federal court (on this ground) is not one derived from the Constitution of the United States, unless in a very indirect sense.

... A right which thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, can not well be described as a constitutional right. (*Kline v. Burke Construction Co.*, 260 U. S. 226, 233).

A similar view is given in the House Judiciary Committee report (H. Rept. No. 669, pp. 3-5) which states, among other things:

The Constitution of the United States in Article III, section 1, provides:

The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.

*The provisions of the bill are expressly limited (sec. 13(d)) to courts whose jurisdiction has been or may be conferred by the Congress, under the foregoing provision of the Constitution.* The Congress having the power to establish, and confer jurisdiction upon, the courts in question, it can not be questioned that it has the power to restrict or curtail the exercise of their powers, as proposed in this bill. The Supreme Court of the United States has clearly recognized that this is the law in *Kline v. Burke Construction Co.* (260 U. S. 226, 234), (1922), wherein the court says that—

*Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the General Government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold, or restrict such jurisdiction at its discretion provided it be not extended beyond the boundaries fixed by the Constitution (Italics supplied).*

Then follows a discussion of authorities bearing upon the power of Congress to restrict the jurisdiction of the constitutional inferior federal courts, which discussion, among other things quotes section 385 of Title 28 U.S.C.A. (the judicial code), a section that clearly does not apply to Territorial courts such as ours, as distinguished from a U. S. District Court in a Territory, and other federal statutes which also clearly are not applicable to our territorial circuit courts. Also the report mentions section 21 of the Clayton Act, which provides:

Sec. 21. That any person who shall wilfully disobey any lawful writ . . . or command of any district court of the United States or any court of the District of Columbia . . . shall be proceeded against for his said contempt as hereinafter provided.

The report then goes on to mention secs. 22-24 of the Clayton Act providing for jury trial in certain criminal contempt cases, and cites *Michaelson v. U. S.*, 266 U. S. 42, 69 L. ed. 162, which sustained the constitutionality of this restriction on the powers of Federal constitutional inferior courts.

The report further states, at page 11, in discussing the definitions of section 13:

The definitions also, as above stated, limit the act to courts of the United States whose jurisdiction has been conferred or limited by act of Congress; that is to say, the *inferior federal courts*.

See also, remarks of Sen. Walsh, 75 Cong. Rec. p. 4692, to the same effect as Rep. Garber's, ante, pp. lii-liii.

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## APPENDIX D-6

(See Brief, p. 59)

**Rep. Sweeney's remarks and other references to congressional debates indicating Congress had only Federal courts in mind in enacting NLGA.**

MR. SWEENEY: . . . This measure is intended to curb the abusive power registered by *certain Federal judges* in the promiscuous issuing of injunctions arising out of labor disputes. *It has application only to the inferior Federal courts of the Nation, and limits the jurisdiction and power of those inferior Federal courts.* . . . (75 Cong. Rec. 5502) (Emphasis added.)

To the same effect are statements on the following pages of volume 75 of the Congressional Record, of Senators Nor-



ris (pp. 4502, 4506, 4509, 4510, 4682, 4928); Blaine (pp. 4619, 4620, 4625, 4629, 4630); Hebert, minority leader (p. 4681); Wagner (p. 4915); Shipstead (p. 4932); Wheeler (p. 4935); Steiwer (p. 4938); Robinson (p. 5000-5001); Logan (p. 5005); and Neely (p. 5014); also, of Representatives O'Connor (pp. 5462, 5463, 5464); Michener, minority leader (whose remarks on another question were given great weight in the *Lewis* case, ante (p. 5464 of Cong. Rec.); Bankhead (p. 5465); Dyer (p. 5465); Greenwood (p. 5466-5467); Oliver (p. 5481); Sparks (p. 5487); Celler (pp. 5490, 5505); Condon (p. 5491); Swing (pp. 5491, 5492); Garber (p. 5493); Summers (p. 5500); Glover (p. 5501); and Fernandez (p. 5513). See, also, references to the views of Prof. Frankfurter, this brief, pp. 46, 58, 92, and Appendix D-8, pp. lviii-lxix.

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## APPENDIX D-7

(See Brief, p. 60)

### Remarks of Sen. Norris and Rep. Black re Federal judges with life tenure.

MR. NORRIS: . . . Is it any wonder that there has grown up a feeling of resentment against some of the actions of *some Federal judges*? Is it any wonder that there has gradually grown up in the minds of ordinary people a feeling of prejudice against *Federal courts*? Is it surprising that there should develop a sentiment against *life tenure for Federal trial judges*? Can anyone doubt that such action on the part of the *Federal judiciary* has gradually developed in the minds of ordinary people a fear that where a system of jurisprudence prevails which enables one man, *endowed with a life tenure* of office, to write a law and then order its enforcement . . . (75 Cong. Rec. 4507); (see also, pp. 4509, 4510, 4930, 4938, for other references by Sen. Norris to life tenure of Federal judges as rendering them peculiarly fit subjects for the restrictions of the act).

MR. BLACK: . . . but here we have courts, *judges, appointed for life*—we do not know at whose request, we do not know with whose indorsement, nor why they were appointed—and we give them power to adjudge a man in advance of his acts. (75 Cong. Rec. 5495).

## APPENDIX D-8

(See Brief, p. 92)

Excerpts from or references to Prof. Frankfurter's writings and committee reports and debates on, and history of, NLGA indicating its procedural nature.

Mr. Justice Frankfurter, who wrote the opinion in the *Hutcheson* case ante 36, and the memorandum of authorities in House Report No. 669 on the NLGA (see p. 12 of Report) below referred to, was one of the prime proponents of the various bills to restrict the powers of inferior Federal courts in labor injunctions. Besides collaborating in writing *The Labor Injunction* (Frankfurter & Greene, 1930) referred to in House Report No. 669, infra p. lxix, he was also co-author of a number of articles, among them: *Congressional Power over the Labor Injunction* (Mar. 1931) 31 Columbia L. Rev. 385, quoting verbatim at p. 413 S. 2497 in the 71st Congress, which is almost verbatim the NLGA; *The Use of the Injunction in American Labor Controversies* (Jan. 1929); L. Q. Rev. Vol. 45, p. 19; *Legislation Affecting Labor Injunctions* (May, 1929) 38 Yale L. J. 879; *Labor Injunctions and Federal Legislation* (April, 1929) 42 Harv. L. Rev. 766; the last two articles being pre-vues of the book which came out later entitled *The Labor Injunction, supra*. Each of these, without exception, points to the *Federal courts* as the worst offenders in such matters, and urges legislation to restrict the jurisdiction of and regulate the procedure in the *Federal courts*. These writings point out the futility of the substantive law approach.

In the book, *The Labor Injunction*, supra, at pp. 150-151, the authors point out (emphasis added) :

Legislative revision of judicial doctrines of *substantive law* has, on the whole, *proved futile*. The influences that for a generation stimulated legislative easing of the sensitized contacts between law and labor therefore began to promote more concrete measures of relief. They sought to meet specific complaints in the equity process. The measures that were proposed from time to time and frequently enacted had two main objectives: *to narrow the scope of equitable jurisdiction in labor controversies*, and *to correct procedural evils* both in the manner of granting the injunction and in the mode of its enforcement.

Later, under the general heading of "LEGISLATION AFFECTING EQUITY PROCEDURE" (p. 182), the authors discuss the Clayton Act and its failure to accomplish what is stated to have been the real intent of Congress.

Under the heading "PROPOSED FEDERAL LEGISLATION" (p. 204), the authors then discuss the pending Shipstead Bill, the ancestor of the present NLGA, which is quoted in the appendix to the book (pp. 279-288). They point out that

The eagerness of employers to seek injunctions in the *federal courts* and the diverse channels through which the *federal courts* enter these controversies, have given the federal labor injunction its political significance. . . . (p. 205).

In discussing possible remedies by legislation, the authors say:

A third method is to deal explicitly with labor disputes by *defining and limiting the exercise of federal jurisdiction* in such controversies. This mode of approach merely recognizes that industrial relations present distinctive problems for the wise use of judicial power. *Upon this basis the Senate Committee fashioned its recommendations.* (p. 210).

Reading this chapter will reveal that the reasoning of the committee reports on what became the NLGA is derived almost verbatim in parts, and certainly in substance, from the ideas expressed in this book.

At page 226, the authors say:

The bill is not a comprehensive code of labor law for the *federal courts*, nor even an all-inclusive formulation of procedural safeguards to remedy revealed defects. The measure under discussion merely deals with the most insistent issues presented by the *labor injunction as utilized by the federal courts* . . .

In this connection, in the article entitled "*Congressional Power over the Labor Injunction*" *supra*, defending the then proposed Norris-LaGuardia Act or one of its direct forbears, the authors say, of the bill:

. . . "*Yellow dog contracts*" are not invalidated; they are only rendered unenforceable in the federal courts. The exact words are: "shall not be enforceable and shall not afford any basis for the granting of legal or equitable relief by any court of the United States. . . ." *Whatever relief may be available in the state courts is open; merely the federal courts must decline to enforce these agreements.* Such a restriction of the ambit of the jurisdiction of the inferior courts denies to no litigant a constitutional right: . . . (p. 401).

But the *dominant intent of this provision, as of the whole bill, is only to restrict federal jurisdiction.* Federal courts are not to be used as instruments for effectuating such agreements. Therefore, an effort by a defendant to remove a case resting upon such a contract from state to federal court will be without avail. If the federal court has been denied jurisdiction over a cause of that character, no removal is permitted, because there is no court to which to remove. . . . (p. 402).

2. *Is the denial of all adequate judicial remedies in case of an illegal strike a denial of due process of law?* This question is not pertinent, for *the bill only withdraws the remedy of injunction. Civil action for dam-*

*ages and criminal prosecution remain available instruments. Illegal strikes are not made legal.* The question misrepresents the significance of the *Truax* case. . . .

(then follows an explanation of the *Truax* case (257 U. S. 328) showing that it was based on a state statute which purported to *make the conduct lawful* in every respect, which was the basis for the holding that it deprived the owner of the business and premises of his property without due process) (pp. 408-9) .

3. *Is what in effect amounts to legalization of strikes that are now illegal under the state law of infringement upon the legislative power preserved to the states?* This again poses what is not in issue. The bill is *not in effect* a “*legalization of strikes that are now illegal under state law*”. It is a *regulation of equity practice in federal courts*, a practice indisputably within the province of Congress to regulate. *State law is untouched and remains what it is.* If the federal courts will thereby enforce in diversity cases different law from that which state courts apply, it is what federal courts do today in diversity cases, and that, too, not because of any congressional action, but through the judiciary’s own power of law-making. (p. 409) .

Incidentally, anent the attack in the opening brief (pp. 28-31) upon the lower court’s resort to the title in connection with the construction of the act, it is interesting to note that Mr. Justice Frankfurter, in his partial dissent as to the intent of that act in the *Lewis* case (91 L. ed. 595, 625) said:

. . . The title of the Act gives its scope and purpose, and the terms of the Act justify its title. It is an Act “to define and limit the jurisdiction of courts sitting in equity”. It *does not deal with the rights of parties* but with the *power of the courts*. Again and again the statute says “no court shall have jurisdiction,” or an equivalent phrase. Congress was concerned with the *withdrawal of power from the federal courts* to issue injunctions in a defined class of cases. (Emphasis added.)

These are the ideas concerning the act of the very authority who wrote the memorandum of legal authorities justifying the act included in the House report on the bill, and who was also consulted by the Senate Judiciary Committee (See Sen. Rept. No. 163 *infra*, p. lxxv), and whose views therefore were given peculiar sanction by Congress in passing the act.

Similar views were expressed in the Congressional debates:

Sen. Norris:

. . . We realized when we were framing the bill that we had perhaps a *difficult task to so frame it that it would be constitutional and would still outlaw the "yellow dog" contract*. I concede frankly that the courts have sustained the "yellow-dog" contract as a rule. *Our attempt was to get around those decisions and to get around them within the limits of our constitutional authority*. I have not any doubt at all that we have succeeded in doing it in the bill now before us. (75 Cong. Rec. 4627).

Sen. Blaine:

. . . at this point I want to call attention to the fact that *we do not propose by this bill to make void "yellow-dog" contracts. We do not undertake to make invalid such contracts*. As I view it, the *employer will have all the common-law remedy now existing respecting such contracts as he has with respect to any other contracts, but the employer will not be permitted to enforce the "yellow-dog" contract by injunctive processes*. That is what is proposed to be done by this bill, in my opinion. (75 Cong. Rec. 4628).

Sen. Hebert, chief proponent of the minority:

Mr. President, the only relief that can be provided anywhere in the bill is that. *It deals with the jurisdiction of the United States courts, and in no way affects the State courts or their jurisdiction*. (75 Cong. Rec. 4681).

Sen. Wagner (referring to the yellow-dog contract provision) :

. . . we declare it to be, as it is, inimical to the welfare of the Nation, and in the exercise of our power to prescribe the jurisdiction of the Federal courts we provide that that promise shall not be enforceable directly or indirectly, legally or equitably. . . . (75 Cong. Rec. 4916) .

Referring to authorities cited by the minority upon the question of the constitutional infirmity of legislation that directly attempted to affect substantive rights themselves, Sen. Wagner adds:

By the bill . . . we do none of the acts condemned by the court. We do not limit the untrammelled power of the employer to dismiss whom he please. We do not direct the employer whom he shall hire. We do announce that the Federal courts will no longer help or hinder him in the pursuit of a nonunion policy. . . . There are numerous instances where the law permits the exaction of a promise to go unpunished but refuses to enforce the promise when made. . . .

. . . . .

Why, then, have we not the power to say that the Federal courts shall not enforce agreements exacted from a workman not to join with his fellow men. . . . (75 Cong. Rec. 4916-7) .

Sen. Walsh (speaking of the yellow-dog contract section of the act) :

. . . However, . . . even though the court should eventually hold that, notwithstanding the character of these contracts . . . the court should find that they still are protected by the Constitution, we are not without remedy, because, so far as the *Federal* courts are concerned, their jurisdiction is controlled entirely by the acts of Congress. We may limit as we see fit the jurisdiction of the *inferior courts of the United States*. . . . (75 Cong. Rec. 4692) .

MR. HEBERT. . . . There is *no provision here which would vitiate the right to sue in a State court.*

MR. BLAINE. Exactly; so that *the only possible legal relief that is denied under the majority bill is relief which may be sought by a corporation or an individual by reason of diversity of citizenship.* (75 Cong. Rec. 4680).

MR. LONG. The bill, as it is reported by the committee, *simply proposes to withhold from the courts certain jurisdiction. That would not prevent litigants from going into the State courts.* The United States courts of every district—in New Jersey or Louisiana or elsewhere—could be denied any equitable jurisdiction at all, *and litigants would be required to go into the State courts to enforce any rights in equity which they might have.* (75 Cong. Rec. 4682-3).

MR. NORRIS. . . . I said I obtained the statute of Pennsylvania. I do not suppose there is any doubt whatever but that there is a similar statute in every State in the Union. In addition to that, *there are the State courts.* Are we going to give jurisdiction to the Federal court to go into the State? *If one has to have an injunction, let him go to his State court and get it; but he does not need to go to either place.* . . . (75 Cong. Rec. 4932).

MR. LAGUARDIA. . . . Mr. Chairman, if these acts of violence are committed or threatened to be committed, there is *no need of resorting to the Federal court. The State authorities and courts have full control and jurisdiction of such local matters.* People may be arrested immediately; but it is only to do something which otherwise would not be properly done that resort is made to the Federal court. . . . (75 Cong. Rec. 5480).

MR. SUMMERS. . . . this bill comes as a protest and as a natural reaction against the abuse of power on the part of some of our Federal judges exercised in labor disputes. . . . One sitting in the galleries and listening to this debate would be justified in concluding therefrom either that *we have no State courts or that this bill strikes down their equity powers.* . . .

. . . . .



You would imagine from some of the remarks we have heard today that *we do not have in this Government any States or any judges or any constabulary, nothing but the Federal Government*. I take these few minutes to direct attention to that. Gentlemen would have you believe that if we were to strike down the equity powers of the Federal courts, there would be no judges left in all America who could exercise the equity powers. . . . (75 Cong. Rec. 5500).

MR. SCHNEIDER. . . . It has been pointed out that there are only 11 States in which the issuance of injunctions in labor disputes is restricted by laws similar to the one we now have under consideration. *In the rest of the States actions brought in the State courts to restrain the legitimate activities of organized labor in time of strike will still be available to the enemies of labor*. And it has also been pointed out that the enactment of this bill will not take away from the Federal Government any rights which it has under existing law to seek and obtain injunctive relief where the same is deemed by Government officials to be necessary for the functioning of the Government.

In other words, *a tremendous field in which the injunction can still be used effectively will remain after the enactment of this bill*. . . . (75 Cong. Rec. 5514).

In this measure it is proposed to deal also with a twin evil, the "yellow-dog" contract, as it has been very appropriately called. I am particularly glad that we are united in *seeking to outlaw—at least to the extent that we can do so, which is in the Federal courts*—this abominable product of autocracy in industry. . . . (75 Cong. Rec. 5515).

In Report No. 163 of the Senate Judiciary Committee on the bill, it was pointed out that from December 12, 1927

to the present the Judiciary Committee, in one form or another, has had under consideration the question of *limiting the jurisdiction of Federal courts in granting injunctions in labor disputes*. (Rept. p. 2).

that *Prof. Frankfurter* and other authorities had been called in to assist in drafting proper legislation (p. 3); that

The limitation of the jurisdiction of *Federal* courts to issue injunctions in labor disputes has been a subject of public discussion for many years. . . . It is fair to say that public sentiment on the subject has reached the conclusion that some such limitation is absolutely necessary. (p. 7) ;

that

The bill, under sec. 4, takes away from all *Federal* courts the power to issue such injunctions. . . .

It prohibits *Federal* courts from issuing injunctions restraining anyone from inducing or advising without threat, fraud, or violence, any of these things, regardless of whether the employee may have signed the so-called "yellow-dog" contract. . . . (p. 17)

that, respecting sec. 6, relating to damages for unlawful acts arising out of labor disputes,

. . . There is no provision made relieving an individual from responsibility for his acts, but provision is made that a person shall not be held responsible for an "unlawful act" except upon "clear proof" of participation or authorization or ratification. Thus a *rule of evidence*, not a *rule of substantive law* is established. (p. 19) .

It is appropriate and necessary to define by legislation the proper rule of evidence to be followed in this matter *in Federal courts*. That is the only object of sec. 6. (p. 21) ;

that, as to sec. 8 of the act,

. . . This doctrine here announced is that persons have no right to seek the aid of *Federal courts* and impose upon them additional burdens who have not sought to do all within their power to avoid the aid of the courts and who are not themselves aggravating or causing the dispute by violation of legal obligations. (p. 22) ;

that, as to sec. 12 of the act, concerning the disqualification of judges in certain cases:

. . . Upon the finding of such a demand another judge shall be designated to hear the contempt proceeding, as provided in section 21 of the Judicial Code. (p. 23)

(it should be noted in this connection, that sec. 21 of the Judicial Code, U.S.C.A. 25, is the section which provides for disqualification of judges of Federal district courts, and provides that in such cases, a new judge shall be designated in the manner provided by other sections of the Judicial Code—28 U.S.C.A. 24 and 27—none of which apply to territorial circuit courts having no Federal jurisdiction); and finally that

Section 13 of the bill defines various terms used in the act. . . .

The *main purpose* of these definitions is to provide for limiting the injunctive powers of the *Federal courts* only in the special type of cases, commonly called labor disputes, in which these powers have been notoriously extended. . . . (p. 25).

Likewise, the House Judiciary Committee in Report No. 669 on the bill, made the following statements (Emphasis added) : that

This bill is the so-called anti-injunction bill. It is the outgrowth of years of agitation in the Congress for *restriction upon the powers of Federal equity courts*. . . . (p. 2) ;

that

. . . Section 1 provides that no *United States court* shall have jurisdiction. . . . (p. 3) ;

that section 3 of the bill, "outlawing" the "yellow-dog" contract, provides that any such promise

. . . is contrary to public policy and shall be *unenforceable in any court of the United States*. . . .

This section *in no wise is concerned with interstate commerce or the application of the Sherman Act and its amendments*, but the Federal courts *obtain jurisdiction* in cases involving such contracts by virtue of *diversity of citizenship*; and injunctions have been issued in the Federal courts on the basis of such contracts of employment. . . . (p. 6-7) ;

(note, that this could not possibly refer to Territorial circuit courts, which never derive their jurisdiction over such contracts from diversity of citizenship) ; that, with respect to sec. 6 of the act:

This provision *does not affect the general law of agency*, and it is necessary, under the circumstances, that the courts should know that Congress expects them not to hold officers or associations liable for the unlawful acts of a member without clear proof of actual participation in, or authorization of, any unlawful acts by the officers or association. (p. 9) .

(here again, the report indicates that substantive rights are not intended to be affected generally, but the act is mainly procedural) ; that, with respect to section 7 of the act,

. . . This section is *largely procedural and restrictive* in character. . . .

As will be noted, this is to prevent courts from issuing injunctions without making a finding of facts . . . or where the public officers fail in their duty. The last provision is considered desirable, because it often happens that complainants rush into a *Federal* court and obtain an injunction the enforcement of which required the court to consider and punish acts which are and ought to be, under our system of government, *cognizable in the local tribunals*. . . . (p. 9) .

(of course, our territorial circuit courts are some of the *very local tribunals* to which the act aims to leave the task of considering and punishing such acts) . Finally, in concluding, the House Report appends a memorandum of the law, saying

Many members of the House who are lawyers have given this subject a great deal of consideration, and have expressed their interest in the question of the *power of Congress over equity jurisdiction of the Federal courts*.

A *very interesting and scholarly memorandum* was prepared on this subject by *Prof. Felix Frankfurter*, of

the Harvard Law School, and *coauthor of a recognized and authoritative work on The Labor Injunction* (Frankfurter & Greene, 1930) , in which members will find not only the *historical background* but an abundance of *judicial precedents and decisions on the subject*.

Then follows the memorandum, which treats exclusively of the Congressional power over *Federal* courts, and *Federal* equity jurisdiction, indicating conclusively again that the *jurisdiction and procedure of Federal courts*, and not territorial courts of local jurisdiction, were the sole subjects of Congressional attention and intent.



IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

INTERNATIONAL LONGSHORE-  
MEN'S AND WAREHOUSEMEN'S  
UNION (CIO), et al.,

*Appellants,*

vs.

CABLE A. WIRTZ, as Judge of the  
Circuit Court of the Second Judicial  
Circuit, Territory of Hawaii, and  
MAUI AGRICULTURAL COM-  
PANY, LIMITED,

*Appellees.*

*Upon Appeal from the Supreme Court of the  
Territory of Hawaii*

ANSWERING BRIEF OF  
APPELLEE CABLE A. WIRTZ, JUDGE OF THE  
CIRCUIT COURT OF THE SECOND CIRCUIT,  
TERRITORY OF HAWAII

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**FILED**

JAN 19 1948

PAUL P. O'BRIEN,  
CLERK





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---

**JURISDICTION**

The statement on jurisdiction made on pages 2 and 3 of Appellants' Opening Brief (hereinafter referred to as the opening brief, or abbreviated "Op. Br."), as amplified by the statement on pages 1 and 2 of the Answering Brief of Appellee Maui Agricultural Company, Limited (said company being hereinafter referred to as the appellee company

and its brief as the answering brief, or abbreviated "Ans. Br."), is adopted for the purposes of this brief in behalf of Appellee Cable A. Wirtz, Judge of the Circuit Court of the Second Circuit, Territory of Hawaii (hereinafter referred to as the appellee circuit judge).

## STATEMENT OF THE CASE

To the statements of the case contained on pages 4 to 7 of the opening brief and pages 2 to 4 of the answering brief, the following is added as a basis for the argument in this brief.

The contempt proceedings referred to on page 4 of the opening brief are summary contempt proceedings charging violations of the temporary restraining order issued in the equity suit which the appellants herein seek to stay. The alleged violations, which occurred only a day after said order was issued, served and publicized, were brought to the attention of the appellee circuit judge by affidavits and motion filed in the equity suit. Thereupon, the matter was referred to the county attorney of the County of Maui, who subsequently instituted summary contempt proceedings for such alleged violations. Said contempt proceedings are still pending. Record 52-53, 93-99.

## SUMMARY OF ARGUMENT

In view of the comprehensive consideration of the issues in this case so ably presented by counsel in the argument in the answering brief (Ans. Br. 9-94), with all of which we concur, we wish to adopt said argument in its entirety and to supplement it with a brief argument bearing on the contempt proceedings referred to in the preceding paragraph of this brief.

The points we wish to make are (1) that said contempt proceedings are criminal contempt proceedings, as distinguished from civil contempt; (2) that criminal contempt

proceedings are separate and independent proceedings and hence the pending contempt proceedings are not within the scope of the petition for writ of prohibition; and (3) the nature of criminal contempt proceedings is such that the determination of the issues in this case in favor of the appellants would not preclude prosecution of said criminal contempt proceedings.

## ARGUMENT

### 1. The contempt proceedings pending before appellate circuit judge are proceedings for criminal contempt as distinguished from civil contempt.

It is generally recognized that there is a substantial distinction between criminal contempt and civil contempt, the fundamental difference being that in the case of civil contempt the purpose of the proceedings is remedial and for the benefit of the complainant while in criminal contempt proceedings the purpose is punitive and to vindicate the authority of the court and the public interest. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 441; *Michaelson v. United States*, 266 U. S. 42, 64; *Lamb v. Cramer*, 285 U. S. 217, 220; *McCrone v. United States*, 307 U. S. 61, 64; *Nye v. United States*, 313 U. S. 33, 42; *United States v. United Mine Workers*, 330 U. S. 258, 302; *Penfield Co. v. Securities & Exchange Commission*, 330 U. S. 585, 590; *Fenton v. Walling*, 139 F. (2d) 608, 609 (cert. den. 321 U. S. 798); *Ando v. Ando*, 30 Haw. 80, 87; 12 Am. Jur. 392.

This basic difference in the purpose of contempt proceedings is reflected in a difference in the form of the proceedings. Proceedings for civil contempt are between the original parties and are instituted and tried as a part of the main cause while proceedings for criminal contempt are between the public and the defendant, and are not a part of the original suit but are separate and independent proceedings.

*Gompers v. Bucks Stove & Range Co.*, supra, at 445; *Penfield Co. v. Securities & Exchange Commission*, supra, at 590; *Parker v. United States*, 153 F. (2d) 66, 70; *United States ex rel. West Virginia-Pittsburg Coal Co. v. Bittner*, 11 F. (2d) 93, 95; *S. Anargyros v. Anargyros & Co.*, 191 Fed. 208, 210. There are, however, variances from the rule, as in *United States v. United Mine Workers*, supra, where it was held that both civil and criminal contempt could be tried in a single proceeding in the main cause. 330 U. S. at 299. Nevertheless, such matters as the identity of the person by whom the contempt proceedings are brought and the title of the contempt proceedings are generally significant. Proceedings brought by the government through its prosecuting officer are almost invariably held to be criminal contempt proceedings. *McCann v. New York Stock Exchange*, 80 F. (2d) 211, 214 (cert. den. 299 U. S. 603); *Dunham v. United States ex rel. Kansas City Southern Ry. Co.*, 289 Fed. 376, 379; *Forrest v. United States*, 277 Fed. 873, 876 (cert. den. 258 U. S. 629); *Stewart v. United States*, 236 Fed. 838, 842; *Back v. State*, 106 N. W. 787 (Neb.).

Since the classification of contempt proceedings as civil or criminal depends upon the purpose of the proceedings, the prayer for relief is regarded as particularly significant and has been held to be determinative. *Gompers v. Bucks Stove & Range Co.*, supra, at 448; *Lamb v. Cramer*, supra, at 220; *Penfield Co. v. Securities & Exchange Commission*, supra, at 590. In other cases the prayer has been treated as only one factor in classification. *Forrest v. United States*, supra, at 876.

Various other factors have been relied on in determining the nature of particular contempt proceedings. For example, in *United States v. United Mine Workers*, supra, the wilfulness of the defendants' conduct and their policy of defiance were considered as supporting the conviction for criminal contempt. 330 U. S. at 303.

An extensive discussion of this problem of classifying contempt proceedings with an analysis of the factors relied on by the courts is contained in an article on the subject *Contempt of Injunctions, Civil and Criminal*, by Joseph Moskovitz, in 43 Colum. L. Rev. 780. For the purposes of this brief, the foregoing discussion is deemed adequate to determine the proper classification of the contempt proceedings in question.

Proceeding, then, to a consideration of said contempt proceedings with a view to determining the classification, we have in the record on this appeal a showing that the proceedings are summary contempt proceedings charging violations of the temporary restraining order issued in the equity suit which the appellants herein seek to stay, that the alleged violations on which the proceedings are based were originally brought to the attention of the appellee circuit judge by affidavits and motion filed in the equity suit, that thereupon the matter was referred to the county attorney and that subsequently summary contempt proceedings were instituted by the county attorney for such alleged violations. Record 52-53; 93-99.

The record does not contain the Information which instituted the contempt proceedings. Whatever may have been the actual reason for the exclusion, an examination of the pleading would show that it was properly excluded for the reason that the proceedings in question are for criminal contempt and accordingly a separate and independent action. A copy of said Information is included as an appendix to this brief for the purpose of facilitating this discussion.

Said Information was filed, it appears, in equity, but given a new number, No. 327 (Appendix, 13, 14), the number of the original equity suit being No. 325 (Record 47; Appendix, 14). The Information further shows that the proceedings were entitled *In the Matter of the*

*Contempt of Court of Benjamin Awana, et al.*, and was brought in the name of the "TERRITORY OF HAWAII, by Wendell F. Crockett, Deputy County Attorney of the County of Maui" (Appendix, 13, 14), as distinguished from the main equity case which was entitled *Maui Agricultural Company, Limited v. International Longshoremen's Union (CIO) et al.*, (Record 23). It further shows that the alleged violations were charged to be "in open and wilful violation of said Restraining Order and in open and willful defiance and contempt of said Order and of [the] Court" (Appendix, 16). Lastly, the information shows that the prayer was for a rule upon the defendants to show cause "why they should not be adjudged guilty of and punished for contempt of \* \* \* Court" (Appendix, 16-17).

It thus appears from the Information that a separate proceeding was brought in the name of the Territory by a duly authorized prosecuting officer charging a wilful violation of the order of the court and praying for punishment for such contempt. On the basis of the authorities hereinabove cited, such facts clearly show, it is respectfully submitted, that the proceedings in question are criminal contempt proceedings.

## **2. Criminal contempt proceedings are separate and independent proceedings and hence the pending contempt proceedings are not within the scope of the petition for writ of prohibition.**

On page 3 of this brief, reference was made to the well-established rule that criminal contempt proceedings are separate and independent proceedings as distinguished from civil contempt proceedings, which are part of the main cause. On the basis of said rule, it is submitted that the pending contempt proceedings are not in issue in this case.

The petition in this case shows that the appellants herein seek to stay further proceedings in a certain cause (Record



20), which, as the exhibits referred to in and attached to and made a part of the petition show, is *Maui Agricultural Company, Limited v. International Longshoremen's & Warehousemen's Union (CIO)* (Record 17, 23, 36, 39). [On pages 36 and 39 and elsewhere in the record, the bracketed references to the court and cause are in error, the proper reference being the Circuit Court of the Second Circuit, Territory of Hawaii, and not the Circuit Court of Appeals.] The petition does not in any way refer to the contempt proceedings, nor is the Territory of Hawaii, the plaintiff in the contempt proceedings, made a party to this case. Hence, it must be presumed that the appellants are not seeking, by the petition in this case, stay of the contempt proceedings.

3. The nature of criminal contempt proceedings is such that the determination of the issues in this case in favor of the appellants would not preclude prosecution of the pending criminal contempt proceedings.

A consequence of the rule that criminal contempt proceedings are separate and independent proceedings as distinguished from civil contempt proceedings, which are part of the main cause, is that criminal contempt proceedings may be prosecuted regardless of the outcome of the main cause while civil contempt proceedings stand or fall with the main cause. *Gompers v. Bucks Stove & Range Co.*, supra, at 451; *United States v. United Mine Workers*, supra, at 294, 295; *Carter v. United States*, 135 F. (2d) 858, 860. Violations of an order are punishable as criminal contempt even though the order has been set aside on appeal (*Worden v. Searls*, 121 U. S. 14, 27; *Salvage Process Corp. v. Acme Tank Cleaning Process Corp.*, 86 F. (2d) 727), or though the main cause has been mooted by a settlement between the parties (*Gompers v. Bucks Stove & Range Co.*, supra, at 451). On the other hand, a settlement of the main cause or the reversal of the order in the main cause bars relief for

civil contempt. *Gompers v. Bucks Stove & Range Co.*, supra, at 451; *Worden v. Searls*, supra, at 26; *Bessette v. W. B. Conkey & Co.*, 194 U. S. 324, 329; *Salvage Process Corp. v. Acme Tank Cleaning Process Corp.*, supra; *S. Anargyros v. Anargyros & Co.*, supra, at 209.

It is therefore a well-established rule that an order issued by a court within its jurisdiction, even though the order be erroneous, must be obeyed, on pain of criminal contempt, until it is reversed by orderly and proper proceedings. *Worden v. Searls*, supra, at 27; *Howat v. Kansas*, 258 U. S. 181, 189; *United States v. United Mine Workers*, supra, at 293. In the *United Mine Workers* case it was established that even an order issued in excess of jurisdiction must be obeyed pending the determination of the question of the court's jurisdiction, at least where the jurisdictional question is a substantial and not merely a frivolous question and consequently that persons violating such an order pending such determination are guilty of and subject to be punished for criminal contempt. *United States v. United Mine Workers*, supra, at 294; *Carter v. United States*, supra, at 862.

Of all the cases cited in this brief none are closer in point, as far as the pending contempt proceedings are concerned, than the two cases last cited. The particular significance of those cases for the purposes of this brief is that even the determination of the issues in this case in favor of the appellants and the issuance of a writ of prohibition as prayed for would not preclude the prosecution of the contempt proceedings.

There remains the question whether the rule of the *United Mine Workers* case obtains in the territorial courts, it being a matter of local law. See *Decision upon Motion for Determination of Defenses in Advance of Trial*, filed December 4, 1947 in *Alesna v. Rice*, Civil No. 769, United States District Court for the District of Hawaii (Ans. Br., Appendix C, at xl). There are a number of decisions of the

Supreme Court of the Territory concerning contempt of orders void for want of jurisdiction, which will be briefly considered, but none contrary to the *United Mine Workers* case.

In *Ex parte Pahia*, 13 Haw. 575, an order to reconvey certain property and the commitment for disobedience of such mandate were held void for lack of jurisdiction. The case clearly involved a civil contempt, as shown by the fact that the commitment was for the purpose of coercing compliance with the order to reconvey. 13 Haw. at 578. Furthermore, the contempt judgment was entirely without foundation in that there was no pleading invoking the jurisdiction of the court for contempt proceedings or any process giving the court jurisdiction over the person adjudged in contempt. 13 Haw. at 581.

In *Dole v. Gear*, 14 Haw. 554, it was held that contempt proceedings to compel alimony payments are subject to be stayed by writ of prohibition pending appeal from the order for alimony. Obviously the case involved only a civil contempt.

Similarly, *Andrews v. Whitney*, 21 Haw. 264, wherein a writ of prohibition was issued to stay proceedings for enforcement of a void order for payment of alimony, was a case of civil contempt, the contempt proceedings having been instituted upon motion of the libelee. 21 Haw. at 265.

In *Sakan v. Ashford*, 23 Haw. 267, a writ of prohibition sought to stay contempt proceedings for violation of an order issued in a suit to establish and enforce a constructive trust was denied on the ground that it was not shown that the court was without jurisdiction. Hence, the statements on the subject of the enforcibility of void orders are mere dicta. There is also the distinction that the case involved only a possible civil contempt.

In one case, however, *Rose v. Ashford*, 22 Haw. 469, a criminal contempt was involved and a writ of prohibition was issued staying the contempt proceedings. The case in-

volved the question of the validity of an order issued by a court alleging a failure on the part of the respondent sheriff to execute promptly a warrant of arrest, the making of a false return of the warrant and failure to comply with a request of the court that he appear before the court to explain the delay in service and ordering him to appear on a day certain to show cause why he should not be adjudged in contempt. Citing the rule that in cases of constructive contempt, such as that alleged in the order, it is necessary, in order to give the court jurisdiction to proceed for contempt, that a formal statement of some sort, such as an affidavit, complaint or information, stating the facts be filed as the basis upon which attachment may issue (22 Haw. at 472), the Supreme Court of Hawaii held that the order was void and the court was without jurisdiction to proceed in contempt for the reason that no such statement was filed. As in *Ex parte Pahia*, supra, the gist of the case is that in a case of constructive contempt the court cannot proceed unless its jurisdiction has been properly invoked. The case is clearly distinguishable from the *United Mine Workers* case and likewise as to the contempt proceedings now pending before the appellee circuit judge, which were instituted by a formal information (Appendix).

It is, therefore, respectfully submitted that the decisions of the Supreme Court of Hawaii are not in conflict with the *United Mine Workers* decision, and that the rule of that case is applicable to the pending contempt proceedings.

## CONCLUSION

We respectfully submit that for the reasons stated in the Answering Brief of Appellee Maui Agricultural Company, Limited, which we adopt, the decision of the Supreme Court of the Territory of Hawaii should be affirmed and further that in no event should the prosecution of the contempt proceedings pending before the appellee circuit judge be stayed.

Dated: Honolulu, Territory of Hawaii, this .....th day of January, 1948.

Respectfully submitted,

WALTER D. ACKERMAN, JR., Attorney  
General of the Territory of Hawaii;  
RHODA V. LEWIS, Assistant Attorney  
General; MICHIRO WATANABE, Deputy  
Attorney General, Attorneys for Appel-  
lee Cable A. Wirtz, Judge of the Circuit  
Court of the Second Circuit, Territory  
of Hawaii,

By *Michiro Watanabe* .....



# APPENDIX

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IN THE

## **Circuit Court of the Second Circuit**

TERRITORY OF HAWAII

AT CHAMBERS

IN EQUITY

# 327

In the Matter of the Contempt of Court  
of: BENJAMIN AWANA, SEICHI DOI,  
ERNEST FERNANDEZ, GEORGE FERNAN-  
DEZ, FRANK FRANCO, LIONEL HANA-  
KAHI, KOICHI ITO, BEN KAHAAWINUI,  
JOSEPH KAHOLOKULA, LIWAI KEALOKA,  
HARRIS YOSHIO NAGATA, RAFAEL PERRY,  
CHARLES REBERA, HITOSHI SERA, and  
TAKESHI SHIMANO.

SUMMARY  
CONTEMPT  
PROCEEDINGS

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INFORMATION

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IN THE

# Circuit Court of the Second Circuit

TERRITORY OF HAWAII

AT CHAMBERS

IN EQUITY

# 327

In the Matter of the Contempt of Court  
of: BENJAMIN AWANA, SEICHI DOI,  
ERNEST FERNANDEZ, GEORGE FERNAN-  
DEZ, FRANK FRANCO, LIONEL HANA-  
KAHI, KOICHI ITO, BEN KAHAAWINUI,  
JOSEPH KAHOLOKULA, LIWAI KEALOHA,  
HARRIS YOSHIO NAGATA, RAFAEL PERRY,  
CHARLES REBERA, HITOSHI SERA, and  
TAKESHI SHIMANO.

SUMMARY  
CONTEMPT  
PROCEEDINGS

## INFORMATION

And now comes the TERRITORY OF HAWAII, by Wendell F. Crockett, Deputy County Attorney of the County of Maui, and, complaining of the respondents mentioned by name in paragraph 4 of this Information, represents to the Court:

1. That at all times mentioned herein there was and still is pending in this Court a certain equity proceeding for injunction entitled "MAUI AGRICULTURAL COMPANY, LIMITED, Petitioner, vs. INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO), et al.", being Equity No. 325, wherein a Temporary Restraining Order was made and issued on October 17, 1946, which Restraining Order at all times mentioned herein was and is still in effect, a true copy of which said Order is attached hereto, marked Exhibit "A" and incorporated herein by reference.



2. That on the 17th day of October, 1946, said Temporary Restraining Order was duly served upon respondents Benjamin Awana, Seichi Doi, Ernest Fernandez, George Fernandez, Frank Franco, Lionel Hanakahi, Koichi Ito, Ben Kahaawinui, Joseph Kaholokula, Liwai Kealoha, Harris Yoshio Nagata, Rafael Perry, Charles Rebera, Hitoshi Sera and Takeshi Shimano, all being respondents mentioned in or covered by said Order.

3. That notice of said Temporary Restraining Order was further given generally to the entire community in Paia, County of Maui, Territory of Hawaii, and elsewhere upon said Island of Maui, by publication of the fact of the issuance of said Order and of the substance of said Order in the late or afternoon editions on October 17, 1946, and in the October 18, 1946 editions of the Honolulu Advertiser and the Honolulu Star-Bulletin, both being newspapers printed and published in Honolulu, City and County of Honolulu, Territory of Hawaii, having a general circulation throughout said Territory, including said Island of Maui, all of which said newspaper editions are usually and were actually delivered and distributed on said Island of Maui on the date of issue thereof, and also by radio announcements on the afternoon and evening of October 17 and the morning of October 18, 1946, over radio stations serving and customarily heard by the inhabitants of said Island.

4. That, notwithstanding that the persons hereinafter named as alleged violators of said Order had due notice of said Order and the contents thereof, as hereinabove set forth, a large number of persons, being members of International Longshoremen's and Warehousemen's Union (CIO), and some of them being members of Local 144 of the International Longshoremen's and Warehousemen's Union (CIO), and some of them being members of Unit 1, Local 144, International Longshoremen's and Warehousemen's Union, and of other persons acting in concert with

them, in excess of one hundred ninety-four persons, and including, the following named persons:

Benjamin Awana	Joseph Kaholokula
Seichi Doi	Liwai Kealoha
Ernest Fernandez	Harris Yoshio Nagata
George Fernandez	Rafael Perry
Frank Franco	Charles Rebera
Lionel Hanakahi	Hitoshi Sera
Koichi Ito	Takeshi Shimano
Ben Kahaawinui	

and many others whose names are at present unknown to said Deputy County Attorney, on the morning of October 18, 1946, under the fraudulent pretense and guise of holding an alleged parade, in open and willful violation of said Restraining Order and in open and willful defiance and contempt of said Order and of this Court, did engage in mass picketing in numbers in excess of one hundred ninety-four persons, and did congregate in crowds, on and near the premises of said Maui Agricultural Company, Limited, petitioner in said injunction proceeding (Equity No. 325 aforesaid), at said Paia, with intent to, and did then and there, interfere with the ingress to and egress from said Petitioner's mill, and other plantation buildings located at said Paia by said Petitioner, its employees and others who might desire entrance to said premises for the purpose of performing work and for other occasion, and did then and there threaten violence and use coercion and intimidation by force of numbers and otherwise by unlawful means upon said Petitioner's employees and others lawfully attempting to enter upon and proceed to and from said Petitioner's said premises.

WHEREOF, the said Deputy County Attorney, for and on behalf of the said Territory, moves this Court for a rule upon the defendants

Benjamin Awana  
 Seichi Doi  
 Ernest Fernandez  
 George Fernandez  
 Frank Franco  
 Lionel Hanakahi  
 Koichi Ito  
 Ben Kahaawinui

Joseph Kaholokula  
 Liwai Kealoha  
 Harris Yoshio Nagata  
 Rafael Perry  
 Charles Rebera  
 Hitoshi Sera  
 Takeshi Shimano

to be and appear before this court, on a day to be named, and show cause, if any they or any of them have, why they should not be adjudged guilty of and punished for contempt of this Court in respect of each and all of the aforesaid contemptuous acts.

DATED: Wailuku, Maui, T. H., this 7th day of November, 1946.

(Sgd.) WENDELL F. CROCKETT  
 Deputy County Attorney of the  
 County of Maui

[Note: The exhibit referred to in paragraph 1 of the foregoing Information has been omitted. It is included in the Record at pages 36 and 39.]



No. 11,568

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

---

INTERNATIONAL LONGSHOREMEN'S AND WARE-  
HOUSEMEN'S UNION (CIO), et al.,  
*Appellants,*

VS.

CABLE 'A. WIRTZ, as Judge of the Circuit  
Court of the Second Judicial Circuit, Ter-  
ritory of Hawaii, and MAUI AGRICULTURAL  
COMPANY, LIMITED,  
*Appellees.*

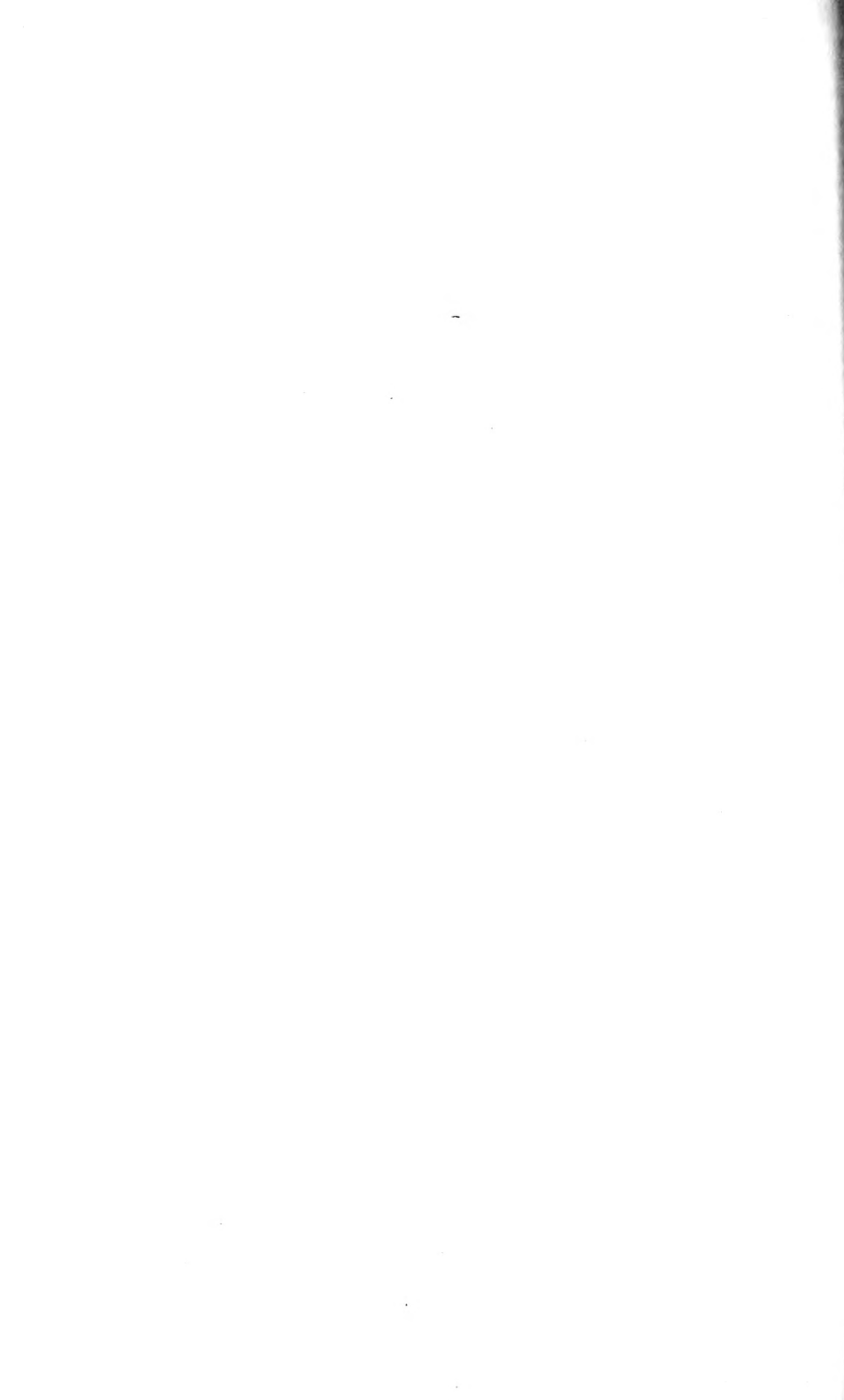
Upon Appeal from the Supreme Court of the  
Territory of Hawaii.

APPELLANTS' REPLY BRIEF.

---

GLADSTEIN, ANDERSEN, RESNER & SAWYER,  
HARRIET BOUSLOG,  
MYER C. SYMONDS,  
By HARRIET BOUSLOG,  
GEORGE R. ANDERSEN,  
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Terminal Building, Honolulu, T. H.,  
*Attorneys for Appellants.*

FILED



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No. 11,568

IN THE  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

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*Appellants,*

vs.

CABLE A. WIRTZ, as Judge of the Circuit  
Court of the Second Judicial Circuit, Ter-  
ritory of Hawaii, and MAUI AGRICULTURAL  
COMPANY, LIMITED,  
*Appellees.*

Upon Appeal from the Supreme Court of the  
Territory of Hawaii.

**APPELLANTS' REPLY BRIEF.**

---

**PRELIMINARY STATEMENT.**

The Appellee, Cable A. Wirtz, adopts *in toto* the brief of the Appellee, Maui Agricultural Company, Limited, commenting in addition on only one point. This reply brief is directed to the answering briefs of each of the Appellees.

### QUESTION PRESENTED.

The question presented is the effect on the jurisdiction of territorial courts of the Norris-LaGuardia Act. Whether the Norris-LaGuardia Act affects the jurisdiction of circuit courts procedurally or substantively is certainly in issue under the petition for Writ of Prohibition.

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### STATEMENT OF THE CASE.

Since the question presented to and considered by the lower court related to the effect of the Norris-LaGuardia Act on the jurisdiction of territorial circuit courts, it is Appellants' contention that the substance of the *ex parte* affidavits filed by the Appellee Maui Agricultural Company, Limited, and the allegations contained in that Company's petition before the defendant judge in the territorial circuit court, are irrelevant.

As a matter of fact, Mr. Tavares, Attorney for the Appellee, Maui Agricultural Company, Limited, was at the time of the presentation of the case below the Attorney General of the Territory representing the defendant judge. He and Mr. Winn who was then counsel for the Maui Agricultural Company, Limited, conceded, and it was so stipulated by counsel for all parties before the argument in the lower court, that the contents of the return of the defendant judge were irrelevant to the issues before the lower court. It was further agreed and stipulated that compliance with local laws was not in issue.

**ASSIGNMENTS OF ERROR.**

Appellants' assignments of error were all directed to express holdings of the lower court. In insisting that only one assignment of error is relevant, Appellees apparently wish to claim the result of the lower court's reasoning without being bound by the process by which it was reached.

Appellants showed in their opening brief that the lower court's conclusion was reached because it found that Congress in the legislative definition of "court of the United States" contained in the act manifested an intention to exclude legislative courts. If each step used in reaching that conclusion is demonstrably false, we are back to the point from which we started—the clear-cut legislative definition which on its face applies to territorial courts. Surely some valid substitute reasoning or authority must be found to justify construing away the unambiguous definition. Yet Appellees cite none.

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**SUMMARY OF ARGUMENT.**

The Appellees unsuccessfully attempt to conceal their real conviction that the Norris-LaGuardia Act is a monstrous and intolerable interference with employers' rights. They strongly imply the application of the Act to the territory would destroy circuit courts.

Obviously motivated by their disagreement with the legislative policy of the Norris-LaGuardia Act, they urge this court to ignore the purpose and public policy

of Congress in adopting the Act, the explicit language Congress used to effect its purpose, and the result of a refusal to accede to the public policy. While they do not, as indeed they cannot, deny the power of Congress to apply the Act to the Territory, they deny that it is conceivable that Congress exercised the power which it has. Appellants take issue with every premise relied upon by Appellees in their Answering Briefs. In reply to the Appellees, Appellants contend:

I. The Constitution of the United States vests in Congress the power to legislate for territory under the jurisdiction of the United States; by the Hawaiian Organic Act Congress—although delegating the exercise of some of its power to the territorial legislature and to territorial courts—specifically reserved to itself the power to legislate for the territory at any time, and required that the power so delegated be at all times exercised in a manner consistent with laws of the United States; Congress has exercised this power on numerous occasions; and Congress exercised this power over territories in passing the Norris-LaGuardia Act.

II. All laws of the United States, not locally inapplicable, are in force in the territory; there is nothing in the Norris-LaGuardia Act that makes it locally inapplicable; nor was there at the time of the adoption of the Norris-LaGuardia Act any territorial law with which its provisions were inconsistent, or in conflict.

III. The history of the Norris-LaGuardia Act and its specific provisions indicate that Congress intended that it should be given full force and effect wherever Congress had the power to make it effective.

IV. A circuit court of the territory, which is a creature of Congress exercising power delegated by Congress, cannot enjoin the exercise of rights specifically made lawful by Act of Congress.

V. Contempt proceedings will not lie for violation of an order which the court clearly had no jurisdiction to issue.

---

## ARGUMENT.

### I.

THE CONSTITUTION OF THE UNITED STATES VESTS IN CONGRESS THE POWER TO LEGISLATE FOR TERRITORY UNDER THE JURISDICTION OF THE UNITED STATES; BY THE HAWAIIAN ORGANIC ACT CONGRESS—ALTHOUGH DELEGATING THE EXERCISE OF SOME OF ITS POWER TO THE TERRITORIAL LEGISLATURE AND TO TERRITORIAL COURTS—SPECIFICALLY RESERVED TO ITSELF THE POWER TO LEGISLATE FOR THE TERRITORY AT ANY TIME AND REQUIRED THAT THE POWER SO DELEGATED BE AT ALL TIMES EXERCISED IN A MANNER CONSISTENT WITH LAWS AND CONSTITUTION OF THE UNITED STATES; CONGRESS HAS EXERCISED THIS POWER OVER THE TERRITORY OF HAWAII ON NUMEROUS OCCASIONS; AND CONGRESS EXERCISED ITS POWER OVER TERRITORIES IN PASSING THE NORRIS-LaGUARDIA ACT.

The Appellees in the Organic Act of 1900 purport to discover an intent on the part of Congress at that

time to give the autonomy of a state to the Territory of Hawaii. Then wishfully, they argue that no subsequent declarations of public policy or of laws of the United States can be construed to change the *status quo* as of that date. But even their premise is a half-truth at best.

Article IV of the Constitution gives to the Congress  
 Power to dispose of and make all needful rules  
 and regulations respecting the Territory or other  
 Property belonging to the United States.

Section 5 of the Organic Act (48 U.S.C.A. 495) provides in part:

That the Constitution, and, except as otherwise provided, all the laws of the United States, including laws carrying general appropriations which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States.

Section 6 of the Organic Act (48 U.S.C.A. 496) provides:

That the laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this Act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States.

Section 55 of the Organic Act (48 U.S.C.A. 519, 562) provides in part:

That the legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable.



At pages 17-23 of Appellants' Opening Brief are set forth the provisions of the Organic Act whereby Congress delegated to the supreme and circuit courts some of its judicial power in the territory, placed certain restrictions on that power, made the exercise of that power subject to modification or amendment by the territorial legislature or by Congress, provided for the appointment of judges for these courts, and fixed their salaries and terms.

The power of the territorial legislature to modify or enact laws is limited to the enactment of laws consistent with the laws and Constitution of the United States; the exercise of judicial power by the supreme and circuit courts is subject to modification by Congress; the laws of Hawaii continued in force by the terms of the Organic Act were only those consistent with the laws and Constitution of the United States. Thus Congress in the Organic Act provided a continuing, ever existent standard for the exercise of power delegated by it to the territorial legislature and courts.

Where in this scheme provided by Congress is the autonomy of a state touted by Appellees?

There is one, and only one, definitive way for Congress to manifest an intent to bestow "autonomy" on the territory: the adoption of a statehood enabling act.

The economic oligarchy in the territory was quite complacent and satisfied—until 1937—with the territorial status they wrought, after their revolution, with

annexation. It is true that anti-trust laws applied internally within the territory, unlike in states, but these laws were not enforced. Although noxious national labor legislation, such as the Clayton Act, the Railway Labor Act, the National Industry Recovery Act and the National Labor Relations Act were extended to and applied internally in the territory, unlike in states, such successful methods of combating labor organizations had been perfected that few labor organizations existed to claim the benefit of these laws.<sup>1</sup> It was not until the Sugar Act of 1937 which discriminated against territories in favor of states and provided for wage determinations by the Secretary of Agriculture<sup>2</sup> that Congress jolted the economic oligarchy into a realization that a territory's privilege is held at the sufferance of Congress. Shock and anger caused a reversal in the 37-year old opposition to statehood.

The Supreme Court of the territory in *Makainai v. Goo Wan Hoy*,<sup>3</sup> expressed its insight into the true status of the territory in contrast with a state much earlier than 1937:

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<sup>1</sup>See Appendix A. Congress was not unaware of the oppression of workers and employer-interference with the right to organize. In Appendix A are set forth excerpts from reports made to Congress pursuant to the Organic Act relative to conditions of labor in the Islands. It will be clear to the court from these reports that if any group of workers ever needed protection, workers in Hawaii did.

<sup>2</sup>Labor Conditions in Hawaii, 1939, 76th Congress, House Document 848, the wage determination in the sugar industry for 1939 is reported as \$1.40 per day for males and \$1.05 for females. "These determinations," it is said, "have been an important cause of the rise of wages on sugar plantations since 1936." (p. 40.)

<sup>3</sup>14 Haw. 607, 609 (1903).

\* \* \* The state, being an independent sovereignty within its sphere, makes its own constitution and laws, creates its own courts and fixes their jurisdiction; while a territory, being a political dependency under absolute control and dominion of Congress, its organic law is made by Congress and *its courts and their jurisdiction and procedure is defined by the same power.* (Italics ours.)

Congress specifically provided in the Norris-LaGuardia Act that its provisions are binding on every "court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress." The lower court is apparently more reluctant to acknowledge the source of its power than its predecessor court in the *Makainai* case.

Appellees, in Gertrude Stein fashion, urge that Congress meant by its definition that court of the United States means court of the United States which has a well-defined meaning which is court of the United States. The simple, clear, explicit words "whose jurisdiction has been or may be conferred or defined or limited by Act of Congress" mean nothing, nothing, nothing at all. Congress, Appellees in essence urge, just doesn't know its own power.<sup>4</sup>

Surely these words are, in the language of *Mookini v. United States*,<sup>5</sup> "an addition expressing a wider connotation".

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<sup>4</sup>See Act of August 24, 1937, 50 Stat. 751, Section 5, where Congress defined "court of the United States" to include "courts of record of Alaska, Hawaii and Puerto Rico." At least in 1937 Congress was aware of its power to confer, define and limit the jurisdiction of territorial courts.

<sup>5</sup>303 U. S. 201, 82 L. Ed. 748.

Surely there is no judicial canon of construction that Congress never intends to use words in their simple and natural meaning.

Even Appellees' premise that the relation of territorial courts to the federal court system is analogous to the relation of state courts to federal courts is erroneous. Appeals from state courts on constitutional issues lie to the Supreme Court of the United States. The territorial courts, however, are integrated into the inferior federal court system, appeals lying from the territorial Supreme Court to the Ninth Circuit Court of Appeals as in the case of appeals from the territorial federal district court.

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## II.

**ALL LAWS OF THE UNITED STATES NOT LOCALLY INAPPLICABLE ARE IN FORCE IN THE TERRITORY; THERE IS NOTHING IN THE NORRIS-LaGUARDIA ACT THAT MAKES IT LOCALLY INAPPLICABLE; NOR WAS THERE AT THE TIME OF THE ADOPTION OF THE NORRIS-LaGUARDIA ACT ANY TERRITORIAL LAW WITH WHICH ITS PROVISIONS WERE INCONSISTENT, OR IN CONFLICT.**

By virtue of the provisions of Section 5 of the Organic Act, *supra*, that all laws of the United States not locally inapplicable are in force in the territory, it is logical to assume that some provision in the Norris-LaGuardia Act manifesting an intention to make the act inapplicable would be required.

Appellees' hysterical contention that an intention to overthrow local autonomy (which, as we have seen, does not exist) must be found in the Norris-LaGuardia

dia Act discloses their violent allergy to the Act and its purposes. They assume that a so-called court of equity cannot exist unless it has inherent power to strike at the very heart of the rights of labor which Congress was endeavoring to protect. They overlook the fact that at the time of the passage of the Act by Congress, eleven states had already limited the power of their courts to issue injunctions in labor disputes,<sup>6</sup> and that others subsequently adopted such acts. At the latest report both state and federal courts in these areas were still in existence.

Appellees overlook the fact that prior to the Act many eminent legal scholars, as well as judges, had branded the issuance of labor injunctions a spurious exercise of equity jurisdiction.<sup>7</sup>

Certainly Congress itself made it plain that it believed equity courts did not have the power which they assumed to exercise for the benefit of employers in industrial disputes.

Thus the Senate Judiciary Committee<sup>8</sup> in reporting the Norris-LaGuardia Act to the Senate stated:

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<sup>6</sup>72nd Congress, House of Representatives, Report No. 669, Report to accompany H.R. 5315, Define and Limit the Jurisdiction of Courts Sitting in Equity.

<sup>7</sup>Frankfurter and Greene; *The Labor Injunction*, pp. 199-205. And see statement of Frankfurter, J.; dissenting opinion (on a different point) in *Mayo v. Canning*, 309 U. S. 310, where he comments: "The withdrawal of the injunction from industrial controversies made by the Norris-LaGuardia Act was in no small part due to the belief by Congress that experience had shown that the use of a legal remedy devised for a simple situation might in a totally different environment become a perversion of that remedy."

<sup>8</sup>72nd Congress, 1st Session, Senate Report No. 163, Report to accompany S. 935. See excerpts from Report set forth in Appendix B.

There can be no question, therefore, that there has been created, as a result of writing law into injunction orders and then enforcing those orders by the same judge who wrote them without a grant of trial by jury, that condition of uniting the two powers of making and enforcing laws in one person or one body of men wherein, using the language of Blackstone, "there can be no public liberty."

It is difficult to see how any civilized people could indefinitely submit to such tyrannical procedure. It is not difficult to understand how such cruel laws, made not by any legislature but by a judge upon the bench, should bring our Federal courts into disrepute. Neither is it difficult to see how such injunctions, violating the conscience of civilization, should frighten persons against whom such injunctions are issued into desperation. What free American citizen is willing to submit to the violation of his sacred rights of human liberty and freedom?

The rule Appellees attempt to invoke—that an intention to repeal local law or an implied repeal of a prior law will not be presumed—has no application here.

Appellees set forth in full in Appendix A to their Answering Brief the territorial statutes dealing with the equity jurisdiction of circuit courts. By section 9648 of Revised Laws of Hawaii, circuit judges at chambers are given power

\* \* \* to hear and determine all matters in equity.

Section 12402 provides that they

\* \* \* shall have full equity jurisdiction, according to the usage and practice of courts of equity in all other cases where there is not a plain, adequate and complete remedy at law.

Equity jurisdiction as used in these statutes is a general concept. The rules invoked by plaintiffs have application to specific laws which on their face cannot be harmonized or cannot co-exist.

If the concept of "equity" were inviolate and immovable, Congress would have had no power to change it, for Article III of the Constitution provides that the judicial power "shall extend to all cases in Law and Equity;" nor could state legislatures remold the concept of equity jurisdiction when state courts are endowed with equity power by the State Constitution. Yet neither the Supreme Court nor state courts found any difficulty in sustaining legislation against anti-labor injunctions, and to uphold the power of the legislative body to establish a public policy against intervention of equity courts in labor disputes.

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### III.

**THE HISTORY OF THE NORRIS-LaGUARDIA ACT AND ITS SPECIFIC PROVISIONS INDICATE THAT CONGRESS INTENDED THAT IT SHOULD BE GIVEN FULL FORCE AND EFFECT WHENEVER CONGRESS HAD THE POWER TO MAKE IT EFFECTIVE.**

It is difficult to conceive how Appellees could have so carefully combed the Congressional Reports and

Congressional debates for references to "federal courts" without grasping an inkling of what Congress was trying to do in the Norris-LaGuardia Act. Appellants have set forth almost in full<sup>9</sup> the report of the Senate Committee because it expresses so conclusively the legislative condemnation of the substantive evil which had developed in labor injunctions and the various manners and means which Congress devised to insure the discontinuance of these evils, both by safeguarding the rights invaded by these evil practices and removing the power of courts subject to its jurisdiction to further perpetuate the evils or violate the rights.

The Senate Judiciary Committee reporting the bill declared:

The primary objective of the proposed legislation is to protect labor in the lawful and effective exercise of its conceded rights—to protect first, the right of free association and, second, the right to advance the lawful objectives of association.

And again in respect to the public policy:<sup>10</sup>

It is believed that the public policy of the United States thus declared is free from any possible objection and fundamentally beyond criticism if we desire to give those who labor equal oppor-

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<sup>9</sup>Appendix B. The first eight and a half pages only are omitted. This portion deals with technical corrections recommended by the committee in the Bill as introduced, the history of this and previous similar bills before the Senate Judiciary Committee, a reprinting of the bill itself, and the pledges of both the Republican and Democratic parties for the passage of such a bill.

<sup>10</sup>See *U. S. v. Hutcheson*, 312 U. S. 219, 61 S. Ct. 463, 85 L. Ed. 788, where Supreme Court lays down proper interpretation and scope of public policy declared in the Act.



tunities in the economic world with the employers of labor.

And in respect to the legislative definitions contained in the Act, which are here so heatedly controverted:

Section 13 of the bill defines various terms used in the act, and it is not believed that any criticism has been or will be made to these definitions.

The main purpose of these definitions is to provide for limiting the injunctive powers of federal courts only in the special type of cases commonly called labor disputes, in which these powers have notoriously extended beyond the mere exercise of civil authority and wherein courts have been converted into policing agencies devoted in the guise of preserving peace, to the purpose of aiding employers to coerce employees into accepting terms and conditions of employment desired by employers.

When the Congress passes legislation to remedy evils "which have become intolerable" and which are "violations of sacred rights of human liberty and freedom" and involuntary servitude, can it be presumed that Congress intended to permit continued oppression by courts and employers in the territories where it has power to remove them?

In every enactment affecting labor, that most sensitive national problem,<sup>11</sup> Congress has exercised its plenary power to legislate for the territory—in the Clayton Act (1912), the Railway Labor Act (1926),

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<sup>11</sup>*U. S. v. Hutcheson*, *supra*.

both of which preceded the Norris-LaGuardia Act (1932), and the National Industrial Recovery Act (1933) which closely followed it, and the National Labor Relations Act (1935).

The cancer Congress sought to tear out by the roots has gained a critical hold in the territory: in three strikes involving from two hundred workers to twenty thousand workers and thousands of acres of plantation property, sweeping *ex parte* injunctions restraining the approximately one hundred thousand members of an international union and all persons in concert with them from mass picketing or congregating in crowds (usually specified as three) have been issued.

The *ex parte* order issued by the defendant judge limited pickets to three (R. 38). It reminds of the very worst features of the worst injunctions that gave rise to the demand for reform and motivated Congress in adopting the Norris-LaGuardia Act.<sup>12</sup>

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<sup>12</sup>The injunction of Judge Benson Hough issued against the United Mine Workers in the 1927 strike is set forth in full at pages 264-269 of *The Labor Injunction* as being typical of one of the worst restraining orders issued by federal courts.

There the court limited picket posts on or adjacent to the public highways leading to the mines to three persons at a post. Judge Hough expressed in words the psychology apparent in Judge Wirtz's order: "Persuasion in the presence of three or more persons congregated with the persuader is not peaceful persuasion, and is hereby prohibited."

## IV.

A CIRCUIT COURT OF THE TERRITORY, WHICH IS A CREATURE OF CONGRESS EXERCISING POWER DELEGATED BY CONGRESS, CANNOT ENJOIN THE EXERCISE OF RIGHTS SPECIFICALLY MADE LAWFUL BY ACT OF CONGRESS.

It is axiomatic that a court of equity cannot enjoin lawful activity.

The Senate Judiciary Committee shows conclusively that the bill was intended to protect substantively the rights which it made unenjoinable. The Committee cites with approval the holding of the Supreme Court in *Texas Railway v. Brotherhood*, 231 U. S. 548, 50 S. Ct. 427, 74 L. Ed. 1034, where the court held that conduct by employers prohibited under that act was enjoinable, even though no procedural remedy for the protection of the substantive right had been provided by Congress.

The discussion of the various provisions of the bill contained in this Report shows that Sections 1-6 dealt with substantive rights and defined the allowable scope of conduct. Sections 7-10 are classed as procedural sections. Sections 11 and 12 confer rights in contempt cases.

Appellees' triumphant argument that that Section 10, providing a right of appeal to the circuit courts, shows conclusively that the Act was intended to apply only to federal district courts, is an attempt to elevate the procedural provisions above the substantive rights. The Supreme Court has never let a substantive right

fail for want of a remedy or because of an inexactly created remedy.<sup>13</sup>

## V.

### CONTEMPT PROCEEDINGS WILL NOT LIE FOR VIOLATION OF AN ORDER WHICH THE COURT CLEARLY HAD NO JURISDICTION TO ISSUE.

The Norris-LaGuardia Act, Appellants contend, clearly and unequivocally by its terms applies to the territory. Until the *ex parte* order involved in the instant case, the application of the Act to the territory was not questioned. In a circuit court decision rendered in *Neves v. Reber* (1938) by Le Baron, J., the Act was declared to be a limitation on the power of territorial circuit courts. From that date uptil the 1946 sugar strike, no challenge of the application of the Act was made.<sup>14</sup>

This is the first time the question has ever reached this court.

If, as Appellants contend, the Act clearly applies, the principle which Appellees contend the *Lewis* case<sup>15</sup> establishes has no application.

Appellees' eagerness to brush aside former authoritative holdings of the Territorial Supreme Court

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<sup>13</sup>See *Texas Railway v. Brotherhood*, supra, and *U. S. v. Hutcheson*, supra. See also Appendix B.

<sup>14</sup>The question was raised before the federal district court in a civil rights suit, *Alesna v. Rice* (Appellees' Answering Brief, Appendix III) in relation to another *ex parte* injunction issued by another circuit court judge who refused to stay felony proceedings for contempt pending the outcome of this case.

<sup>15</sup>*United States v. United Mine Workers*, 330 U. S. 258.

holding that contempt will not lie for violation of a void order, and their eagerness to adopt what they allege is now the federal rule seems somewhat inconsistent with their local autonomy thesis.

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### CONCLUSION.

Appellants believe that the Norris-LaGuardia Act—which after all is only a statutory sanction of the best and long established practice in equity<sup>16</sup>—is applicable to the Territory and binding on its circuit courts.

Dated, Honolulu, T. H.

March 1, 1948.

GLADSTEIN, ANDERSEN, RESNER & SAWYER,

HARRIET BOUSLOG,

MYER C. SYMONDS,

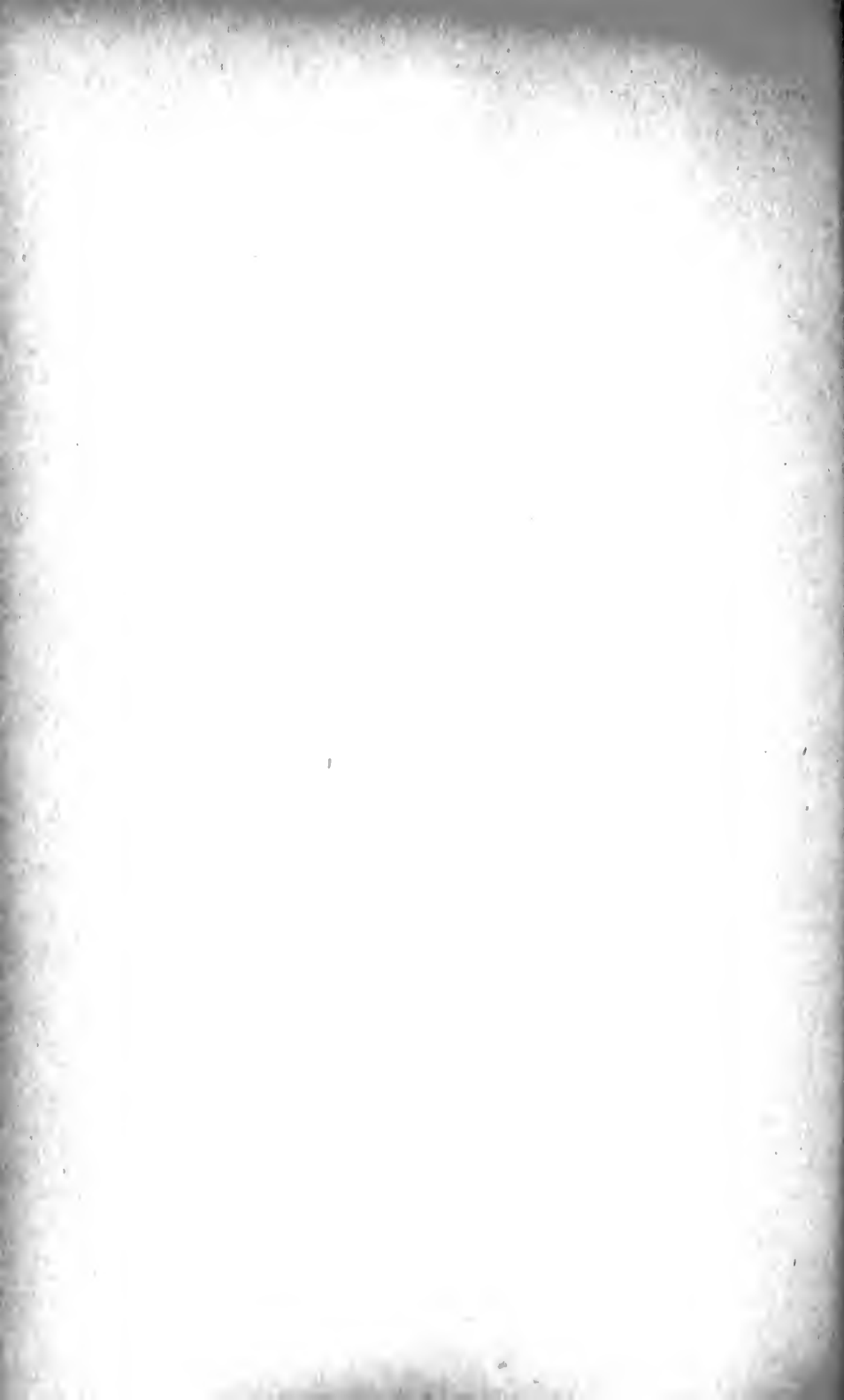
By HARRIET BOUSLOG,

GEORGE R. ANDERSEN,

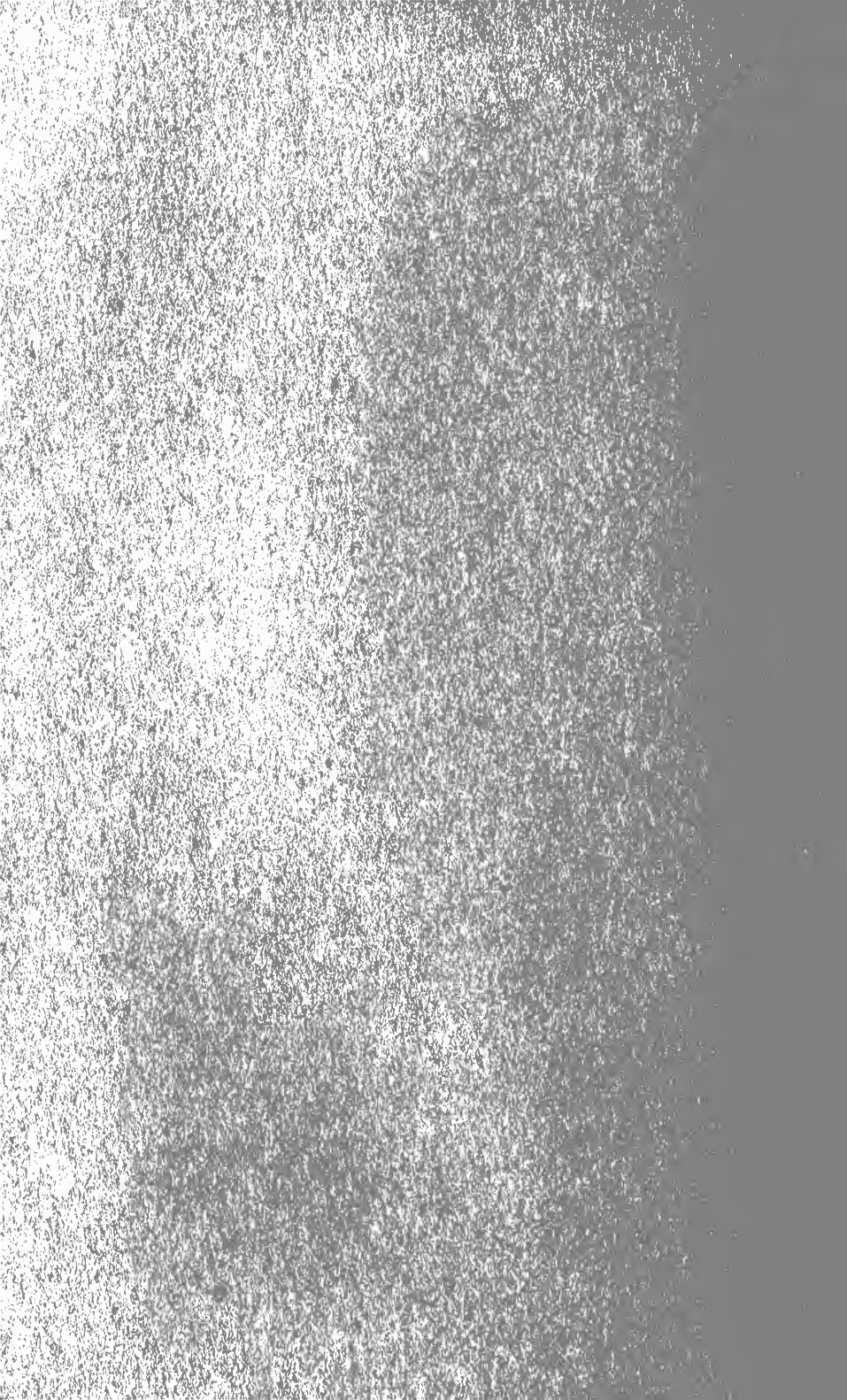
*Attorneys for Appellants.*

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<sup>16</sup>Senate Judiciary Report, Appendix A; Pomeroy, *Equity Jurisdiction* (4th edition), Sec. 1685.



## **Appendices.**





## Appendix A

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Labor Conditions in the Territory of Hawaii, 1929-30,  
U. S. Department of Labor, Bulletin No. 534 of  
the Bureau of Labor Statistics:

“Labor organizations in the Hawaiian Islands are few in number, small in membership, and with the exception of the barbers’ union, have no agreements with the employers.” (p. 117.)

Labor in the Territory of Hawaii, 1939, 76th Congress,  
3d Session, House Document No. 848, Bulletin  
No. 687, United States Department of Labor,  
Bureau of Labor Statistics:

“The high degree of intercorporate control makes it ~~im~~possible to mobilize the resources of all large enterprises to restrict the growth of labor unions and to combat strikes in whatever fields of industry they may occur. There is a tendency on the part of management to assume that unionism is synonymous with dangerous radicalism, possibly because the labor movement in Hawaii has not always been wisely led. The result of this attitude is the feeling that labor unionism is a common menace to all Hawaiian enterprise, and that the duty of combating its development is a common problem of the management of all industries whenever labor trouble occurs. Thus, although management has done much for labor in Hawaii, it has used every influence at its command to restrict labor organization.

\* \* \* \* \*

“The position of the individual plantation worker is especially vulnerable. The house in which he lives, the store from which he buys, the fields in which he finds his recreation, the hospital in which he is treated, are all owned by plantation management, which in turn has its policies controlled from the offices of the factories in Honolulu.

“Whether it is justified or not, there is a prevalent feeling among the majority of Hawaiian workers that a bad record with any important concern in the Territory makes it difficult to obtain employment in any other concern, and that to be associated with labor union activities is certain to weaken their employment opportunities, if not destroy their economic future.” (p. 198.)

\* \* \* \* \*

“In comparison with the highly integrated character of industrial management, the organization of labor in the Territory is meager.

“To understand the development of labor organization in Hawaii, it is necessary to remember that in less than 70 years the population has increased from 56,000 (in 1872) to well over 400,000 \* \* \*” (p. 199.)

“The total membership of all unions in the Territory has been increasing. Accurate figures are not available. Estimates of total membership by union officials vary from 3,500 to 6,000 members. Even if the larger figure is accepted as accurate, it would indicate that less than one twenty-fifth of the gainfully employed are unionized.” (p. 203.)

## Appendix B

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Excerpts from

72d Congress

1st Session

SENATE

Report

No. 163

TO DEFINE AND LIMIT THE JURISDICTION OF COURTS  
SITTING IN EQUITY.

February 4, 1932.—Ordered to be printed.

MR. NORRIS, from the Committee on the Judiciary,  
submitted the following

### REPORT.

(To accompany S. 935)

\*   \*   \*   \*   \*   \*   \*

The injunction process is an extremely harsh remedy. Particularly is this true when a restraining order is issued without any notice to any of the defendants; and in nearly every case in a labor dispute where an injunction is issued, the restraining order is the first step. The first knowledge which the defendant has is service of notice upon him that the restraining order has already been issued. Before he is given an opportunity to be heard, he is enjoined, and in most cases he is restrained from doing acts and things which seriously interfere with, and sometimes completely deny, his fundamental right of liberty of action which belongs to every free citizen.

That there have been abuses of judicial power in granting injunctions in labor disputes is hardly open

to discussion. The use of the injunction in such disputes has been growing by leaps and bounds.

It is impossible to report with accuracy the number of injunctions issued in either the State or Federal courts in connection with labor disputes in recent years. Only a small percentage of these injunction cases are reported officially. For example, approximately 300 were issued in connection with the railway shopmen's strike of 1922, but only 12 were officially reported (Frankfurter on "The Labor Injunction," p. 52).

In testimony before the committee the president of the American Federation of Labor submitted a partial list of 389 labor injunctions in State and Federal courts during the last decade, most of which are unreported. (Hearings, February, 1928, pp. 77-86.) Out of over 260 cases listed by the Massachusetts Bureau of Statistics in the period of 1898-1916, only 18 were officially reported. (p. 51.) A large majority of injunction proceedings are never carried beyond a restraining order or temporary injunction and, therefore, are unlikely ever to reach the stage of official reporting, which is concerned largely with final decrees and with decisions of appellate courts. Therefore, exact statistics can not be presented, but the statement can be safely made that since 1890, when labor injunctions were practically unknown, their issuance has steadily increased until there are few controversies of substantial importance between employers and employees in which one or more injunc-

tions will not be issued out of either a State or a Federal court.

The right of wage earners to organize and to act jointly in questions affecting wages, conditions of labor, and the welfare of labor generally is conceded and recognized by all students of the subject. An increasing necessity for the organization of labor has been brought about by modern economic conditions and methods of doing business, which have in the main been developed by the aid of governmental authority.

It is obvious that existing conditions under which large employers of labor possess unprecedented power to dictate contracts and conditions of employment have been developed through governmental grants of authority to form corporations and organizations of corporations, whereby thousands of owners of property are enabled to combine hundreds of millions of dollars of capital and, in this way, substantially to control and sometimes to monopolize opportunities for employment. Such a power, unrestrained by the organization of labor, would permit employers arbitrarily to fix the wages and conditions of labor under which millions of men and women would find their only opportunity to earn a living.

A single laborer, standing alone, confronted with such far-reaching, overwhelming concentration of employer power, and compelled to labor for the support of himself and family, is absolutely helpless to negotiate or to exert any influence over the fixing of his wages or the hours and conditions of his labor. A man

must work in order to live. If he can exercise no control over his conditions of employment, he is subjected to involuntary servitude.

The efforts of the workers to preserve their freedom of association and their freedom in association to influence the fixing of wages and working conditions present questions which are unique and demand specific legislative action. The situation has been very well described by Chief Justice Taft in the opinion of the court delivered by him in *American Foundries v. Tri-City Council* (257 U. S. 184, at p. 209), reading in part as follows:

\* \* \* Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects.

\* \* \* They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. \* \* \* The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend be-

yond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood.

The foregoing opinion is cited with approval in the unanimous opinion of the Supreme Court handed down May 26, 1930, in *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*, in support of the following statement in the opinion of Mr. Chief Justice Hughes:

“The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. (Citing the *Tri-City* case.) Congress was not required to ignore this right of the employees, but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife.

If we concede, as we must, that labor has the right to combine for the lawful purpose of securing employment and has likewise the right to combine for the purpose of securing increased wages or bettering conditions of labor, then it follows, as the late Chief Justice Taft has so well stated, that the strike becomes a lawful instrument in the economic struggle between employer and employee. It would be hy-

poetry, however, to concede these rights to labor and then to prohibit any effective exercise of these rights by labor. The primary object of the proposed legislation is to protect labor in the lawful and effective exercise of its conceded rights—to protect, first, the right of free association and, second, the right to advance the lawful object of association.

No one will seriously doubt the right of Congress, under the Constitution, to limit the jurisdiction of Federal courts. The jurisdiction, for instance, of the district courts of the United States is given by act of Congress. All the courts of the United States except the Supreme Court could be entirely abolished by act of Congress, and, while Congress could not give to these inferior courts jurisdiction greater than is provided by the Constitution, it could, on the other hand, within the limits of the Constitution, give to the inferior courts such jurisdiction as Congress in its wisdom deems just. It follows, also, that having given this jurisdiction, it can, by act of Congress, take away all or any part of it. This has been clearly held by the Supreme Court of the United States in *Myers v. United States* (272 U. S. 52). At page 130 the Supreme Court said:

\* \* \* It is clear that the mere establishment of a Federal inferior court does not vest that court with all the judicial power of the United States as conferred in the second section of Article III but only that conferred by Congress specifically on the particular court. It must be limited territorially and in the classes of cases to be heard; and



the mere creation of the court does not confer jurisdiction except as it is conferred in the law of its creation or its amendments.

In an earlier case the Supreme Court held:

The judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good. (Cary v. Curtis, 3 How. 235 (U. S.) at 244.)

In a fairly recent case, the Supreme Court, construing the power of the inferior federal courts to exercise jurisdiction over controversies between citizens of different states, pointed out that:

The right of a litigant to maintain an action in a Federal court (on this ground) is not one derived from the Constitution of the United States, unless in a very indirect sense.

And continued:

Certainly, it is not a right granted by the Constitution. \* \* \* The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. \* \* \* A right which

thus comes into existence only by virtue of an act of Congress, and which may be withdrawn by an act of Congress after its exercise has begun, can not well be described as a constitutional right. (Kline v. Burke Construction Co., 260 U. S. 226, 233.)

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#### PUBLIC POLICY.

Relief by injunction is an extraordinary and harsh remedy. It should not be resorted to except in cases where such action is imperatively demanded; and yet injunctive relief is often the only adequate and effective relief against many wrongs and to prevent many irreparable injuries in controversies of infinite variety.

It is not sought by this bill to take away from the judicial power any jurisdiction to restrain by injunctive process, unlawful acts or acts of fraud or violence. In order to assist the courts in the proper interpretation of the proposed legislation, it has been attempted to declare, by act of Congress, the public policy of the United States in relation to labor disputes and the issuing of injunctions in connection therewith. This is done in section 2 of the proposed substitute bill, as follows:

\* \* \* Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of

contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

It is believed that the public policy of the United States thus declared is free from any possible objection and fundamentally beyond criticism if we desire to give those who labor equal opportunity in the economic world with the employers of labor.

In the case of *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*, decided May 26, 1930, previously quoted, the court had under consideration the provision of the railway labor act, confirming in railway employees the right of self-organization "free from the interference, influence or coercion" of employers. It will be noted that this right of employees, written into the railway labor act, is the same right which is affirmed in the declaration of public policy in the proposed bill, which affirms, in section 2, the employee's "full freedom of association, self-organization and designation of representatives of his own choosing," and provides that

the employee "shall be free from the interference, restraint, or coercion of employers of labor." Therefore, the decision of the Supreme Court of May 26, 1930, sustaining the constitutionality and the enforceability of this right of employees under the railway labor act, directly and conclusively sustains the constitutionality of the declaration of policy in the proposed bill and the provision of the proposed bill making contracts contrary to such public policy nonenforceable in the federal courts. In this most recent opinion, the Supreme Court held:

Such collective action (of employees) would be a mockery if representation were made futile by interferences with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both.

It is also equally clear that the Congress has the right to declare the public policy of the United States so long as the policy thus declared does not conflict with the Constitution.

Where Congress has not declared the public policy it is within the province of the court to decide what the public policy is, but when such public policy has been declared by Congress it is the duty of the courts to follow such policy and to decide litigated questions related thereto in accordance with the public policy thus declared.

In the case of the *People v. City of Chicago* (321 Ill. 466-475) the Supreme Court of Illinois said:

The public policy of a State is to be found embodied in its constitution, its statutes, and, when these are silent on the subject, in the decisions of its courts. The public policy of the State, when not fixed by the Constitution, is not unalterable but varies upon any given question with changing legislation thereon, and any action which, in the absence of legislation thereon, by the decisions of the courts has been held contrary to the public policy of the State, is no longer contrary to such public policy when such action is expressly authorized by legislative enactment.

Another Illinois case on this subject is *Union Trust & Savings Bank v. Telephone Co.* (258 Ill. 202). The Supreme Court of Illinois said:

While no statute has been enacted declaring such exclusive contracts criminal or giving a right of action to persons prejudiced by them, the courts have declared the public policy of the State, in accordance with the common law, to be opposed to such contracts which tend to put the power to render public service in the hands of one corporation and to take it away from all others. The legislature has the power to change this policy. It is a legislative question whether the public interest will be promoted by monopolistic rather than competitive service.

Chief Justice Marshall, in the case of *McCulloch v. Maryland* (4 Wheat. (U. S.) 315, 423), used the following language:

Where the law is \* \* \* calculated to affect any of the objects intrusted to the Government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.

The Supreme Court has expressly upheld the jurisdiction of Congress to declare the public policy of the United States in the case of *Michaelson v. United States* (266 U. S. 42, 68). In that case, the following language was used:

The words of the act are plain and in terms inclusive of all classes of employment; and we find nothing in them which requires a resort to judicial construction. The reasoning of the court below really does not present a question of statutory construction, but rather an argument justifying the supposititious exception on the ground of necessity or of policy—a matter addressed to the legislative and not the judicial authority.

The decisions and opinions of the Supreme Court of the United States in *Bailey v. Alabama* (219 U. S. 219) are significant in this connection. In that case the majority of the court held that a statute although in terms punishing a man for fraud in violating a contract to work, had the “inevitable effect” of convicting him of a crime in simply refusing to work and thus enforced peonage. This was held to be unconstitutional, in conflict with the thirteenth amendment, which was intended, as held in the majority opinion by Mr. Justice Hughes:

\* \* \* to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude.

The opinion further stated:

There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based.

It is noteworthy in this case that the dissenting opinion by Mr. Justice Holmes proceeded on the ground that the contract in question (to render services in consideration of an advance payment) was in itself a legal one, and that therefore a man could be legally punished for obtaining money by making such a contract with a fraudulent intention of breaking it. He met the argument that the enforcement of such contracts would result in peonage by the pertinent comment: "If the contract is one that ought not to be made, prohibit it." Thus both opinions already support the right of Congress to declare contracts resulting practically in involuntary servitude to be contrary to public policy and to deny their enforceability or validity in the federal courts.

The declaration of a public policy is not new to the Congress of the United States. Such a policy is explicitly declared in the present railway labor act, as previously noted. In this connection, it is exceedingly interesting to trace the history of that act. Originally, in the transportation act, it was provided that disputes between employers and employees should, if

possible, be "decided in conference between representatives designated and authorized so to confer." In administering this law the labor board found great difficulty on account of the interference by employers with the free designation of representatives by the employees. The chairman of the board appeared before the Interstate Commerce Committee of the Senate and explained the trouble. (See Hearings, Interstate Commerce Committee of the Senate on S. 2646, 68th Cong., 1st sess.) On account of this difficulty, the present railway labor act included this specific provision:

Representatives, for the purposes of this act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other. (Par. 3, sec. 152, title 45, U. S. C. A., 1929 sup.)

This act definitely declared the same public policy in regard to railway employees as is declared in the proposed bill in regard to all employees, and this provision of the railway labor act has been sustained by the United States Supreme Court in *Texas & New Orleans Railroad Co. v. Brotherhood of Railroad & Steamship Clerks*, decided May 26, 1930, as previously cited.

Another instance in which Congress declared the public policy of the United States is found in section 15a of the interstate commerce act, passed as a part



of the transportation act of 1920. The language referred to in that act is as follows:

Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States. (41 Stat. 489.)

The declaration by Congress of the public policy thus declared was interpreted and sustained by the Supreme Court of the United States in the case of *Dayton-Goose Creek Railway v. United States*. (263 U. S. 456.) The opinion of the court in this case shows that the act was interpreted and sustained upon grounds of the public policy thus declared by Congress. The court in that case said:

The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. \* \* \* To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the commission.

Title IV of the transportation act, embracing paragraphs 418 and 422, is carefully framed to achieve its expressly declared objects.

The public policy of the United States in regard to disputes between labor and employers of labor, having been declared as provided in the proposed bill, it will become the duty of the courts to carry out this policy and to uphold it in passing upon any litigated questions which may arise under the act. Such a declaration of public policy should be of great assistance to the courts in the adjudication of any controversies which may arise.

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#### **THE "YELLOW DOG" CONTRACT.**

One of the very serious difficulties which has arisen in many of the injunctions which have been issued in labor disputes has been the so-called yellow-dog contract. This contract is one which requires the employee, as a condition of obtaining employment, to agree that he will not join a union while he is in such employment, or, that if he is then a member of a union, he will disassociate himself from it; that he recognizes the right of the employer to discharge him without notice; that he will not quit without giving to his employer notice sufficient to enable the employer to hire some one to take his place. Such contracts frequently require the employee to agree in advance to accept such conditions of labor, hours of labor, etc., as may from time to time be decided upon by his employer. Not all of these contracts are the same, but,

in general, the conditions are such as those which have been briefly outlined. In all of them the employee waives his right of free association and genuine representation in connection with his wages, the hours of labor, and other conditions of employment. In other words, he surrenders his actual liberty of contract and to a great extent he enters into involuntary servitude. Yet the Supreme Court has held very recently that "collective action would be a mockery if representation were made futile by interference with freedom of choice." (Texas & New Orleans case previously cited.)

It is no defense to say that he is not compelled to sign a contract, as is so clearly pointed out in the citation from Chief Justice Taft heretofore quoted. He is helpless in dealing with his employer. This was not always true. It is only under modern conditions where under the law, employers organize; where large corporations control labor in an entire line of industry. He is dependent upon his daily wage and so is his family. Therefore, he must accept whatever wages and whatever conditions are laid down by the employer. He has no other course to pursue. Union on his part with his fellow workers is absolutely necessary to protect his own liberty and, if he signs away this right, to a great extent he becomes the slave of his master.

In sustaining the right of railway employers to organize the Supreme Court held:

Congress was not required to ignore this right of the employees but could safeguard it and seek to

make their appropriate collective action an instrument of peace rather than of strife. (Texas & New Orleans case previously cited.)

This doctrine upholds the purpose of the proposed bill.

One of the objects of this legislation is to outlaw this "yellow dog" contract. It has become necessary for Congress to take some action in regard to these contracts, because many of the injunctions which have been issued by federal courts have been based wholly or in part upon such contracts on the assumption that they are valid and not contrary to public policy.

At first blush it would seem unnecessary to pass any legislation upon the subject, because it is difficult to see how any court could sustain such a contract even though there were no statute condemning it. Many of the most eminent jurists have always believed that such contracts were void for several reasons.

First. They are contrary to public policy. If these contracts are held to be legal in one type of litigation, it would follow that they must be held legal in all other controversies, and thus in order to sustain life and support families, laboring men may be compelled to enter into practical peonage. If men must agree in advance to surrender any real liberty of contract in order to attain employment they are, under coercion of necessity, forced into working under conditions of involuntary servitude.

Second. These contracts should be held void because they are entered into without consideration. The employer on the one hand has his work which he wants done. The laborer on the other hand, as a consideration for his part of the contract, undertakes to perform the labor. In practically every case there is no hiring for a definite period; no assurance of either work or fixed wages. The employer gives up none of his freedom of action and furnishes no consideration for the promise of the employee that he will surrender ordinary rights of "liberty of contract" which are inherent in every free citizen.

Third. Such contracts should be held void because they are signed by the employee under coercion. The employee is forced to accept all of these burdensome conditions in order to support himself and family, because no man will voluntarily deprive himself of his power of self-protection.

Nevertheless, since such contracts have been held by the courts to furnish a legal basis for preventing employees from organizing for self-help, it seems to be necessary that some legislative action should be taken to liberate workers from a servitude thus imposed. The bill declares that such contracts are:

\* \* \* contrary to the public policy of the United States, shall not be enforceable and shall not afford any basis for the granting of legal or equitable relief by any court of the United States.

## ABUSES OF INJUNCTIVE POWER.

One of the indefensible things contained in a great many of the injunctions issued by federal judges is the enjoining of any person, organization, or corporation from paying benefits to laborers who are engaged in carrying on a strike. As a rule, labor unions provide for a fund out of which they pay benefits to their members who are out on a strike. These injunctions prohibit them from paying such benefits, although the accumulation of this fund has been in part contributed by the very men who are on a strike and under the rules of the union they are, as a matter of fact, entitled to these benefits.

Some of these injunctions go still further. They not only prohibit the unions from paying any strike benefits to men who are on a strike, but they prohibit any person, whether a member of the union or not, from in any way giving any assistance to the persons who are on the strike. It is a common thing, in the operation of coal mines, for the owners of the mine to own the houses in which the laborers live. They make a contract with the laborer for the rental which shall be paid, providing also for the surrender of the premises under conditions named in the contract of lease.

If a dispute arises between the employer and the employee as to whether the contract has been violated and as to whether the owner is entitled to dispossess the employee, the question becomes one of forcible entry and detainer under the laws of the state where the property is located. These laws usually, if not

always, provide for the trial of forcible entry and detainer cases before an inferior court. Either side, being dissatisfied with the decision of the court, has the right to take an appeal. If the appeal is taken by the tenant he must put up a bond, not only to pay the costs, but to pay a reasonable rental for the property in case the decision in the higher court is against him. This is a right given him under the state law. The state law is general and applies to every one. It is the only means by which the question in dispute between landlord and tenant can be fully decided. If a tenant is wrongfully withholding the property the landlord is protected by the bond which the tenant must give providing for the payment of rental if the case shall ultimately be decided against him. Yet, strange as it may seem, federal judges have been in the habit of issuing injunctions restraining outsiders—usually the term used is “any person whomsoever”—from doing anything to assist the laborer in a forcible entry and detainer case pending in the state court.

All persons are enjoined from furnishing bonds to take those cases up on appeal. All persons are enjoined from paying any money in the way of expenses in connection with such litigation in the state courts. The injunctions often go far enough to prevent an attorney from giving any advice to the employee who is trying to hold possession of a house belonging to the employer. All persons are restrained from giving them any assistance while they are living in these houses, including food and fuel. When the judges of the United States, by extending the extraor-

dinary remedy of the injunction, should prohibit laboring men from litigating in state courts, under the law of the state, to sustain what they claim to be their rights, is almost beyond human comprehension. In truth, such a summary method of depriving persons of their "day in court" has never been held to be "due process of law" in any other class of cases.

The bill, under section 4, takes away from all federal courts the power to issue such injunctions. It also, in the same section, prohibits the issuing of injunctions which restrain employees from—

\* \* \* assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute.

It prohibits federal courts from issuing injunctions restraining anyone from inducing or advising without threat, fraud, or violence, any of these things regardless of whether the employee may have signed the so-called "yellow dog" contract.

Section 4 also prohibits the granting of injunctions which would restrain strikers from giving publicity to the existence of or the facts involved in a labor dispute. One of the most recent injunctions in a labor dispute was issued in the District Court of the United States for the Northern District of Iowa. This injunction was issued on the 29th day of March, 1930, enjoining the defendants, among other things, from—

\* \* \* printing, publishing, issuing, circulating and distributing or otherwise communicating, directly or indirectly, in writing or verbally to any person,



association of persons, or corporation, any statement or notice of any kind or character whatsoever, stating or representing:

(1) That there is a strike at the mill or plant of complainant at Fort Dodge, Iowa; or that the strike of 1921 is still in existence; or that there is a controversy over wages or conditions of employment between complainant and its employees; or any false statement with reference to conditions of employment at complainant's plant.

(2) That complainant is unfair to organized union labor, or that its products are or were unfair to organized labor, or are on an unfair list.

(3) That complainant forces or requires its employees to sign or subscribe to the so-called "yellow dog" contract.

The defendants in this case, it will be observed, were not allowed to tell anyone that a strike was in progress. They were not allowed to give any publicity in any way to the fact that a strike existed. They were not allowed to tell anyone that the complainant required its employees to sign the "yellow dog" contract. In other words, their mouths were absolutely closed and "free speech" was forbidden. They could not, without violating this injunction, have sought advice from an attorney. The son would not be allowed to seek advice from his own father. And if the defendants violated this severe decree they would be liable for contempt of court, which means that they would be tried for an offense made illegal by the judge—an offense consisting of an act which

would be perfectly lawful under the laws of the state where the controversy existed. They were not only forbidden to violate this judge-made statute, but, in case they did violate it, they would be tried by the man who made the statute. They would not be allowed a trial before a jury of their peers—a privilege granted to the vilest of criminals.

It has long been recognized by students of law and government that the power to make law and the power to enforce law should be separated as a protection against tyranny. To prevent executive tyranny, the legislative power has been carefully separated from the executive power in our scheme of government and to prevent judicial tyranny it is equally necessary to preserve the separation of the legislative power from the judicial power.

A warning against the growing exercise of legislative power by the courts in injunction cases was uttered long ago by the great commentator, Blackstone, in the following language:

In all tyrannical government, the supreme magistracy or the right of making and enforcing laws is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together there can be no public liberty. (1 Blackstone 142.)

It is amazing to realize that in the last 40 years there has developed in the American courts the practice of writing a special law to fit the individual case by judges in issuing labor injunctions; and that thereupon the judge, who himself wrote the law, has under-

taken to prescribe the penalty for its violation and to punish the violator without permitting the accused to enjoy a trial by jury or even to insist upon a trial before another judge. It can not be successfully claimed that the courts have not written into these injunction cases a new law of labor disputes, fitting the law to each particular case, and then enforcing this new law made by the court.

Pomeroy, perhaps the leading authority, describes the development of the law compactly in his *Equity Jurisprudence* in the following language:

The courts have thus been required to face such questions as the nature and extent of the capitalist's rights in the management of his business and of the workingman's property in his labor; to decide how far the employer shall be protected in his right to have labor and custom flow to him free from the interference of third parties and how far the laborer shall be protected from similar interference in his contract of employment or his rights to secure employment; to determine what limits shall be placed upon the individuals and combinations of individuals in seeking their economic advancement at the expense of their fellows. All these and other problems have come before the courts in rapid succession. (Pomeroy, *Equity Jurisprudence* (4th Ed.) vol. 5, p. 4566, sec. 2018.)

There can be no question, therefore, that there has been created, as a result of writing law into injunction orders and then enforcing those orders by the same judge who wrote them without a grant of trial by

jury, that condition of uniting the two powers of making and enforcing laws in one person or one body of men wherein, using the language of Blackstone, "there can be no public liberty."

It is difficult to see how any civilized people could indefinitely submit to such tyrannical procedure. It is not difficult to understand how such cruel laws, made not by any legislature but by a judge upon the bench, should bring our Federal courts into disrepute. Neither is it difficult to see how such injunctions, violating the conscience of civilization, should frighten persons against whom such injunctions are issued into desperation. What free American citizen is willing to submit to the violation of his sacred rights of human liberty and freedom?

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#### RESPONSIBILITY FOR UNLAWFUL ACTS.

Section 6 of the bill relates to damages for unlawful acts arising out of labor disputes. It is provided that officers and members of any labor organization, and officers and members of any employers' organization, shall not be held liable for damages unless it is proven that the defendant either participated in or authorized such unlawful acts, or ratified such unlawful acts after actual knowledge thereof.

To hold that officers or members of a labor organization, or the organization itself, should be liable for damages for unlawful acts committed while a strike is on, without clear, actual proof of authorization, par-

ticipation in, or ratification of such unlawful acts, would go far toward the destruction of organized labor.

Moreover, it will be observed that this section, as do most all of the other prohibitive sections of the bill, applies both to organizations of labor and organizations of capital. The same rule throughout the bill, wherever it is applicable, applies both to employers and employees, and also to organizations of employers and employees.

In most cases where strikes occur involving a great many employers and employees and covering a comparatively large territory, there are often unlawful acts committed in the way of injury to property or to persons. It is not the intention of the bill to protect anybody, whether he be employer or employee, from punishment for the commission of unlawful acts either as against property or persons. But no person or organization should be held thus liable unless he or it caused the unlawful act or participated in it or ratified it. It has often occurred that employers themselves have secured the services of detectives who, under the guise of labor men, have gained admission into labor unions. When this happens these detectives are usually doing everything within their power to incite employees who are on strike to commit acts of violence, and such detectives, contrary to the definite instructions of labor union leaders, sometimes commit unlawful acts for the express and only purpose of laying the foundation for injunctive process,

of bringing discredit upon the union, and of making its officers and members liable for damages.

In case of a strike, where the officers of the labor union are doing everything within their power to prevent acts of violence from being committed by any person, the law should fully protect them and save them and the members of their organization who are following their advice from liability in damages because of unlawful acts of persons who are either directly or indirectly connected with those who are trying to defeat the purposes of the strike.

Opposition to this section has been voiced on the ground that it seeks to establish a "new law of agency". In the first place, this section is concerned especially with establishing a rule of evidence. There is no provision made relieving an individual from responsibility for his acts, but provision is made that a person shall not be held responsible for an "unlawful act" except upon "clear proof" of participation or authorization or ratification. Thus a rule of evidence, not a rule of substantive law, is established. "The general power of every legislature to prescribe the evidence which shall be received and the effect of that evidence in the courts of its own government", has been repeatedly upheld by the Supreme Court. (See *Fong Yue Ting v. U. S.*, 149 U. S. 698, 749; *Bailey v. Alabama*, 219 U. S. 219, 238.)

But the argument is made that a man is held legally responsible for the acts of his agents taken in due course of employment. Thus argument is evidently

based upon a doctrine of the civil law of negligence. It has no application to the criminal law. If a man is held responsible for an unlawful act, his responsibility rests on the basis of actual or implied participation. He is responsible for conspiring to do an unlawful act or for setting in motion forces intended to result, or necessarily resulting in an unlawful act.

Strictly speaking, the legal relation of principal and agent does not exist in regard to the commission of criminal offenses. All who participate in the commission of such offense are either principals or accessories. (*Anderson v. State*, 22 Ohio State 305.)

But where the agent's criminal act is unauthorized and is not sanctioned or acquiesced in by the principal, especially where it is contrary to the principal's direct instructions, the latter can not be held criminally responsible therefor. (*Clark and Skyles*, *Law of Agency*, Vol. I, p. 1140.)

The distinction should be clear. A man operating a dangerous machine negligently injures someone, and the negligence is imputed to the employer. But, there is a distinction between the torts of an employee and the crime of an employee, and criminal responsibility is not to be imputed. If the president of a corporation sends a bill collector to persuade a debtor to pay a bill, instructing him to collect it in a peaceable manner, he does not become responsible for an assault by his employee upon the debtor.

According to the same reasoning, why should an officer of a labor union, who has specifically advised members that violence must be avoided, become re-

sponsible for the hot-headed action of some member in perhaps assaulting a strike breaker? Again, the relationship between officers and members of labor unions and other members is not that of employer and employee. The officers chosen by a union are not employers of the membership. They have no control over their associates based upon the power of determining whether or not they will employ them. It may be accepted that if a group associated in common activities becomes controlled by a lawless majority, it may be necessary for law-abiding men to dissolve their association with lawbreakers; but the doctrine that a few lawless men can change the character of an organization whose members and officers are very largely law-abiding is one which has been developed peculiarly as judge-made law in labor disputes, and it is high time that, by legislative action, the courts should be required to uphold the long established law that guilt is personal and that men can only be held responsible for the unlawful acts of associates because of participation in, authorization or ratification of such acts. As a rule of evidence, clear proof should be required, so that criminal guilt and criminal responsibility should not be imputed but proven beyond reasonable doubt in order to impose liability.

There has been a distinct conflict of opinion in the courts as to the degree of proof required. Mere ex parte affidavits establishing a certain amount of lawless conduct in the prosecution of a strike have been held in some instances to establish a "presumption" that the entire union and its officers were engaged in



an unlawful conspiracy; and, on the other hand, other courts have declined thus to substitute inference for proof, rejecting such a doctrine in language such as the following used in a New York case: "Is it the law that a presumption of guilt attaches to a labor union association?" Various examples of these different rulings are quoted in *The Labor Injunction*, by Frankfurter and Greene, pp. 74-75.

It is appropriate and necessary to define by legislation the proper rule of evidence to be followed in this matter in federal courts. That is the only object of section 6.

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#### PROCEDURE.

The bill, in section 7, provides for the procedure which shall be followed in case application is made for a temporary restraining order or for a temporary or permanent injunction. It provides that no temporary or permanent injunction shall be issued except after hearing the testimony of witnesses, under oath, in open court. The court is also required, before it issues a temporary or permanent injunction, to permit the defendants to offer testimony in opposition to such injunction; and, before the court is authorized to issue the temporary or permanent injunction, it must find that unlawful acts have been threatened or committed and will be executed or continued unless restrained; that substantial and irreparable injury to complainant's property will follow, and that as to each item of relief granted greater injury will be in-

flicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief.

This procedure balances the effect of an order upon both parties, and while an injunction might be granted against certain unlawful acts the injury to complainant from such acts can not be made the basis of enjoining other acts from which complainant will suffer but little, but the prohibition of which may cause greater injury to the defendants. This is only statutory sanction of the best and long established practice in equity. (See Pomeroy, Equity Jurisprudence (4th ed.), sec. 1685.)

It is likewise provided in section 7, that in addition to the ordinary requirements applying to all applications for injunction, the court must find—

That the public officers charged with the duty to protect complainant's property have failed or are unable to furnish adequate protection.

This is an entirely new provision, but it is believed to be a just one.

These injunctions are issued upon an allegation, among other things that unless the order is issued complainant's property will be injured or destroyed. If the public officers whose duty it is to protect complainant's property are able and willing to give the protection required by law, there is no reason why the courts of equity should take over the functions of the executive department and undertake to police their districts and no reason why the extraordinary and

one-sided remedy of an injunction should be resorted to. It seems, therefore, but fair that before the injunction is issued, the court should find from the evidence that such officers have failed or are unable to furnish the protection required by law.

Injunctions are often applied for and issued for the moral effect that such injunctions will have in disheartening and discouraging employees engaged in a strike, rather than because of any real necessity to protect property.

Provision is also made in the bill for the issuance of a temporary restraining order without notice. This can be done only if the complainant shall allege that such temporary restraining order is necessary and that if time is taken to give notice a substantial and irreparable injury to complainant's property will be unavoidable.

Before issuing such temporary restraining order, however, the court must take testimony under oath, and such testimony must be sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice.

Injunctions issued without notice to the defendants against whom the injunctive order is sought are always *ex parte*. No good reason exists why this evidence thus taken, without the presence of the defendant, should not be required to be sufficient, if sustained to sustain an order issued after notice and hearing. If the complainant can not make a *prima facie* case without notice, he certainly never would be

able to make such a case after notice when the defendant was in court contesting the issuing of the injunction.

The bill provides that such temporary restraining order so issued without notice shall not be effective for a longer time than five days. This, however, is a reasonable requirement. The only object in issuing a temporary restraining order without notice is because it is alleged by the complainant that notice of such application would bring about destruction of his property. Therefore, the time that such extraordinary process should be effective without notice should not be prolonged beyond the time that it would take to give notice, and it is difficult for any mind to conceive of a condition where notice could not be given and a hearing held within the 5-day limit.

It is provided in section 8 that no restraining order or injunctive relief shall be granted to any complainant who has not complied with any obligation imposed by law in regard to the settlement of any labor dispute. Neither shall such order issue unless the complainant has made every reasonable effort to settle such dispute, either by the aid of negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration. But where such negotiations are in progress and have not been completed, the court is not required, before issuing the writ, to await the outcome of such action if the court is satisfied that irreparable injury is threatened.

This section simply requires that a complainant shall not be entitled to injunctive relief who has failed

to comply with any legal obligations which may exist, to be performed on his part. In other words, he must go into court with clean hands. This doctrine here announced is that persons have no right to seek the aid of federal courts and impose upon them additional burdens who have not sought to do all within their power to avoid the aid of the courts and who are not themselves aggravating or causing the dispute by violation of legal obligations.

It has often occurred, where employers have refused to confer with their employees, as required by law; or where they have refused to comply with the requirements of the law for the protection of employees, that they have nevertheless sought to have the court restrain the employees from promoting their interests properly in the resulting dispute. An employer who has himself brought on a controversy by wrongful conduct is not entitled to the aid of equity in advancing his interests in the resulting conflict.

A court of equity acts only when and as conscience commands; and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses, and whatever use he may make of them in a court of law, he will be held remediless in a court of equity. (*Deweese v. Reinhard*, 165 U. S. 386, 390.)

Other cases and authorities upholding this principle written into the proposed bill are cited in the recent opinion of the Supreme Court of Wisconsin in *Adler & Sons v. Maglio* (228 N. W. 123), where the court

denied injunctive relief and dismissed the complaint of an employer whose conduct was described by the court as follows:

Plaintiff pursued a course of conduct that precipitated a labor war. When the tide of battle seemed to be settling against it, the plaintiff sought to withdraw from the field to which it had deliberately gone, and appealed to a court of equity for protection from the consequences that naturally flowed from the course of conduct which it had deliberately pursued.

A court of conscience will not extend its strong arm to protect one who has pursued such a course of conduct. It will leave such applicant for relief where it had deliberately chosen to place itself. (P. 125.)

Later the court further upheld application of the equitable rule in the following language:

Its strict application to all labor controversies ought to admonish both parties to these modern industrial struggles that, while they may conduct their own affairs in any way that does not violate the law, neither can be guilty of conduct that invades the rights of the other in regard to, or all events connected with, the matter of litigation, so as to in some measure affect the equitable relations subsisting between the two parties without forfeiting all right to resort to the extraordinary powers of equity. (P. 126.) (See also *Cornellier v. Haverhill Shoe Manufacturers Association*, 212 Mass. 554; *Weegham v. Killefer*, 215 Fed. 168; *Pomeroy*, *Equity Jurisprudence* (fourth ed.) sec. 398).)

The bill also provides for a speedy appeal by any party to the case who may be dissatisfied with the action of the court, either in allowing or denying the injunction; and when a case is appealed to the circuit court of appeals, it becomes the duty of that court to consider the case with the greatest possible expedition and to give such cases precedence over all other matters except older matters of the same character.

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#### JURY TRIAL IN CONTEMPT CASES.

Section 11 of the bill provides that where a person is charged with indirect criminal contempt for violation of a restraining order or injunction, the defendant shall have the right to demand a speedy and public trial by a jury. This requirement does not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice. Neither does it apply to misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court.

Section 12 provides that the defendant in any proceeding for contempt of court is authorized to file with the court a demand for the retirement of the judge sitting in the proceeding if the alleged contempt arose from an attack upon the character or the conduct of the judge and if the attack occurred otherwise than in open court. Upon the finding of such a demand another judge shall be designated to hear the

contempt proceeding, as provided in section 21 of the Judicial Code.

It will be observed that sections 11 and 12 have a general application and are not confined to labor disputes.

The ordinary criminal laws provide that any person charged with a crime shall have the right to a jury trial. The person tried for contempt of court is tried for a criminal act. It is true this act has not been made criminal by a statute, but by the order of a judge. The judgment, however, can deprive the defendant of his liberty, can confine him to jail, and the length of the term of confinement is within the discretion of the judge who made the order. The judge becomes the legislature and, as such legislature, he makes something a crime that is not a crime under the general law. He then sits in judgment and tries the person who is charged with violating the law which he has enacted. What difference is it to the defendant, so far as his punishment is concerned, whether the law has been made by the judge or by the legislature? His suffering is just as great in one case as in the other. Why should he be deprived of a jury trial when the law is made by one man instead of by the regular legislative authority? And in addition to all this, what defense can be made of the law which provides that the defendant shall have no opportunity, not only for an impartial jury, but for an impartial judge as well? And when the charge is made that the contempt arises from an attack upon the character or the conduct of the judge, what prin-



principle of justice would permit this same judge to sit in judgment upon the accused? All sense of justice and all fair judicial procedure revolt at such a condition.

If an attack is made upon the character or the conduct of the judge by a writer in a newspaper, for instance, is it fair, is it compatible with our idea of jurisprudence, that the judge against whom the attack is made should preside at the trial of the offender? Suppose a judge were assaulted on the street by a common thug. Our procedure would not permit this judge to sit at the trial of the person charged with the assault and battery. He would be tried under the laws provided by the legislature. In an injunction case, the general laws of the legislature would not apply. The person assaulted would not only preside at the trial but he would fix the punishment without regard to statute but in accordance with his own idea as to what the punishment should be.

It is interesting to note that, severe as was ancient law, it was the prevailing practice in the English courts for centuries that trials for criminal contempt were tried by a jury. It is only in the American courts in the last century that such trials by the judge alone developed. And yet we live under a Constitution which provides that—

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. (Amendment 6.)

Also—

The trial of all crimes, except in cases of impeachment, shall be by jury. (Art. III.)

The power of the Congress to require trial by jury in cases of indirect criminal contempt should not be now subject to serious question. Criminal contempt consists of disobedience of the orders of the court, obstructions to the administration of justice, which are punished as an offense against the court and differ from civil contempt in that the purpose of punishment is not to grant relief to a litigant but to maintain the dignity of the court and uphold the power of government. Direct criminal contempt consists of misbehavior in the presence of the court or so near thereto as to interfere directly with the administration of justice. Such contempts are expressly excepted from the provisions of trial by jury. Indirect criminal contempt consists of violation of the orders of the court, which is exactly the same as the violation of law, except that the law is written in the order of the court instead of in a statute.

The Supreme Court sustained the right of trial by jury required by congressional enactment in the Clayton Act in cases of indirect criminal contempt in the case of *Michaelson v. United States* (266 U. S. 42), where the unanimous opinion of the Supreme Court, written by Mr. Justice Sutherland, reads as follows:

Contempts of the kind within the terms of the statute (criminal contempts described in the Clayton Act) partake of the nature of crimes in all essential particulars. "So truly are they

crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure, 3 Transactions of the Royal Historical Society, N. S., p. 147 (1885), and that at least in England it seems that they still may be and preferably are tried in that way." *Gompers v. U. S.* (233 U. S. 604, 610-611.) \* \* \* The statutory extension of this constitutional right (trial by jury) to a class of contempts which are properly described as "criminal offenses" does not, in our opinion, invade the powers of the courts as intended by the Constitution or violate that instrument in any other way. (pp. 66-67.)

Section 13 of the bill defines various terms used in the act, and it is not believed that any criticism has been or will be made to these definitions.

The main purpose of these definitions is to provide for limiting the injunctive powers of the federal courts only in the special type of cases, commonly called labor disputes, in which these powers have been notoriously extended beyond the mere exercise of civil authority and wherein the courts have been converted into policing agencies devoted in the guise of preserving peace, to the purpose of aiding employers to coerce employees into accepting terms and conditions of employment desired by employers.

The proposed bill is designed primarily as a practical means of remedying existing evils, and limitations are imposed upon the courts in that class of cases wherein these evils have grown up and become intolerable. This is a reasonable exercise of legis-

lative power, and in order that the limitation may not be whittled away by refined definitions of what persons are to be regarded as legitimately involved in labor disputes, the bill undertakes specifically to designate those persons who are entitled to invoke the protections of the procedure required.

The other sections of the bill contain the usual provisions in regard to the possibility of the court's holding portions of the act invalid and in relation to the repeal of acts in conflict with the provisions of the proposed legislation.

IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

INTERNATIONAL LONGSHOREMEN'S AND  
WAREHOUSEMEN'S UNION (CIO), et al.,  
*Appellants,*

vs.

CABLE A. WIRTZ, as Judge of the Circuit  
Court of the Second Judicial Circuit,  
Territory of Hawaii, and MAUI AGRICULTURAL COMPANY, LIMITED,  
*Appellees.*

Upon Appeal from the Supreme Court of the  
Territory of Hawaii

**APPELLANT'S PETITION  
FOR REHEARING**

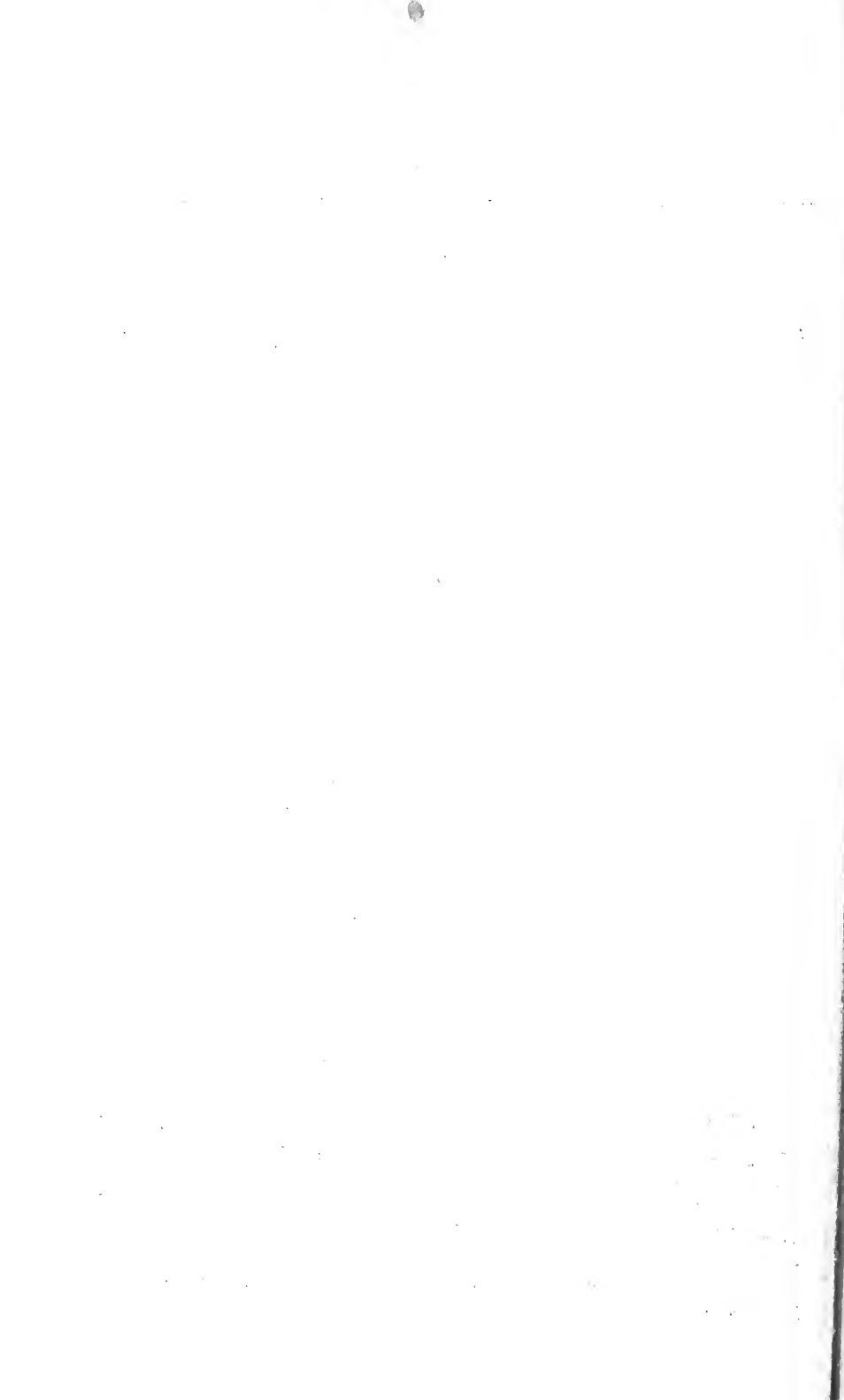
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FILED

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PAUL P. O'BRIEN,  
CLERK,



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Appellants respectfully request the Court to reconsider its decision entered herein on September 27, 1948,<sup>1</sup> and to grant appellants a rehearing in this case on the following grounds:

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<sup>1</sup> Extension of time to November 15, 1948 granted by Court to file petition for rehearing.

**THE DECISION OF THE COURT DOES NOT GIVE EFFECT  
TO THE PUBLIC POLICY DECLARED IN THE NORRIS-  
LAGUARDIA ACT, OR INTERPRET THE PROVISIONS  
OF THAT ACT TO CARRY OUT ITS PURPOSE.**

Appellants' contention that the Norris-LaGuardia Act applies to the Territory of Hawaii does not rest merely upon the language of Section 13(d) of the Act on which the Court relies. It rests on the declaration of the public policy of the United States set forth in Section 2 of the Act, and upon each and every provision of the Act. Congress specifically directed the courts to interpret all provisions to carry into effect the public policy which was made positive, substantive law.<sup>2</sup>

The primary objective of the Act is "to protect labor in the lawful and effective exercise of its conceded rights—to protect, first, the right of free association and, second, the right to advance the lawful objects of the association."<sup>3</sup>

The Act accomplishes these purposes in two ways. First, it denies to federally created courts the power

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<sup>2</sup> Senator Blaine, a drafter and supporter of the bill, a member of the Senate Judiciary Committee, and a member of a special subcommittee of the Judiciary Committee which studied the proposed bill and similar bills and held hearings thereon during the 70th, the 71st and the 72nd Congresses, stated in the debate in the Senate, "When a declaration of public policy goes to the extent of declaring substantive law, then it ceases to be a mere declaration of public policy, but is the enactment of positive, substantive law." (Congressional Record, Vol. 75, Part 5, page 4681.)

<sup>3</sup> Senate Reports 72nd Congress, First Session, Vol. 1 (Dec. 7, 1931 to July 16, 1932), U. S. Govt. Printing Office, Report No. 163 to accompany Senate S935, page 10.



to enjoin certain specified conduct, denies power to enforce in law or equity, so-called "yellow-dog" contracts, and otherwise defines and limits the exercise of the residue of equitable jurisdiction in labor disputes. Second, it legalizes as federal substantive rights the rights of free association, self-organization, designation of representatives, negotiation of the terms and conditions of employment, free from the interference, restraint or coercion of employers of labor or their agents in these rights,<sup>4</sup> and legalizes the right to engage, singly or in concert, in the conduct enumerated in Section 4 of the Act, and enacts as substantive rights the safeguards contained in subsequent sections respecting responsibility for unlawful conduct, the right to jury trials in indirect contempt cases, etc.<sup>5</sup>

The Supreme Court has held that the public policy of the Norris-LaGuardia Act and the purpose of the Act must be given hospitable scope even if meticulous words are lacking, or even though Congress has failed to express its intent in words, or has expressed them only in the situations most likely to

<sup>4</sup> Norris-LaGuardia Act, Section 2. Both the Senate and House Reports call attention to the fact that the statement of public policy creates the same right for all employees as was given to railroad employees in the Railroad Labor Act and sustained by the Supreme Court and enforced in equity in *Texas and New Orleans Railroad Co. vs. Brotherhood of Railroad and Steamship Clerks*, 281 U.S. 584 (1930). See Senate Reports 72nd Congress *op. cit.* pages 11-15, House Reports 72nd Congress, Vol. 2, Report No. 699, pages 5-6.

<sup>5</sup> *United States v. Hutcheson*, 312 U.S. 219, 236, 85 Law. Ed. 788, 795. The Court said, "The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized labor activity as redefined by the later act. In this light, Section 20 removes all such conduct from the taint of being in violation of any law of the United States, including the Sherman Act."

occur to the mind,<sup>6</sup> or even if Congress had no consciousness of intention.<sup>7</sup>

The Court's decision does not give proper weight to the broad purposes of the Act and construes the Act as merely procedural.

It is inconceivable that Congress formulated a public policy of the United States and created clearly defined substantive rights, which it declared neces-

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<sup>6</sup> In *United States vs. Hutcheson*, *supra*, Justice Frankfurter, speaking for the Court, stated:

Such legislation must not be read in a spirit of mutilating narrowness.

On matters far less vital and far less interrelated we have had occasion to point out the importance of giving "hospitable scope" to Congressional purpose even when meticulous words are lacking. *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U.S. 381, 391, 59 S. Ct. 516, 519, 83 L. Ed. 784, and authorities there cited. The appropriate way to read legislation in a situation like the one before us, was indicated by Mr. Justice Holmes on circuit:

A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before. *Johnson v. United States*, 1 Cir., 163 F. 30, 32, 18 L.R.A., N. S., 1194.

<sup>7</sup> In the *Keifer* case cited by the court, in the *Hutcheson* case, it is said:

This is not a textual problem; for Congress has not expressed its will in words. Congress may not even have had any consciousness of intention. The Congressional will must be divined, and by a process of interpretation which, in effect, is the ascertainment of policy imminent not merely in the single statute from which flow the rights and responsibilities of Regional, but in a series of statutes utilizing corporations for governmental purposes and drawing significance from dominant contemporaneous opinion regarding the immunity of governmental agencies from suit.

sary to prevent involuntary servitude,<sup>8</sup> and yet intended to permit its territorial agents who exercise only legislative, executive and judicial power delegated by Congress to contravene and fly in the teeth of that public policy.

## II

**IF THE LEGISLATIVE DEFINITION IN 13(d) OF THE ACT IS INTERPRETED TO EFFECT THE PUBLIC POLICY AND PURPOSES OF THE ACT AND TO RENDER MEANINGFUL THE SUBSTANTIVE RIGHTS CREATED, THE WORDS MUST BE GIVEN THEIR NATURAL MEANING RATHER THAN THEIR TECHNICAL MEANING. THE NATURAL MEANING COMPREHENDS ALL FEDERALLY CREATED COURTS, WHETHER UNDER ARTICLE III OR ARTICLE IV OF THE CONSTITUTION, WHOSE JURISDICTION HAS BEEN OR MAY BE CONFERRED OR DEFINED OR LIMITED BY CONGRESS.**

Technical words standing alone, or words to which a technical meaning has been ascribed by courts in the past, are generally construed in their technical sense unless a contrary intent is manifested in the Act as a whole. Here, however, the technical words "court of the United States" do not stand alone. To construe the legislative definition, as the court does, in its narrowest possible sense is to reduce the definition to "court of the United States" means "court of the United States."

Congress, in drafting the Act, was concerned—one might say obsessed—with the question of its power. It sought to do its utmost to write the Act so that the

<sup>8</sup> Senate Reports *op. cit.*, p. 9, Debates, *passim*.

Supreme Court would uphold its power to determine public policy and determine jurisdiction of inferior federal courts. This is unmistakably clear from the history of the Act, the House and Senate Reports, and from the debates. Every Supreme Court decision affecting labor was carefully considered. Congress wanted to be absolutely certain that to the best of its ability, it precluded courts from emasculating and mangling the Act and frustrating its will as courts had done in interpreting the Clayton Act.

The court's rationale that Congress, by the legislative definition, merely wished to extend the scope of the Act to constitutional federal courts created in the future is not supported by the legislative history. Congressional attention was at all times focused on the question of power. The House Judiciary Committee unanimously reported the Act in substantially the form it was enacted. In the Senate, the majority report was agreed to by eleven members and six members submitted a minority report. The minority contended that they were wholeheartedly in accord with the purposes of the Act but feared that some of its provisions might be held unconstitutional, and therefore, narrowed the scope of the bill presented by the majority.

Congress was particularly concerned with the case of *Truax v. Corrigan*, 257 U.S. 312 (1921), in which the Supreme Court held an Arizona anti-injunction act unconstitutional. Congress carefully avoided classification of individuals and dealt with subject matter, that is, rights, in the hope of avoiding what

the Supreme Court found was the infirmity of the Arizona law.

The majority argued that since the Constitution vests in Congress the power to create courts, other than the Supreme Court, Congress had power to abolish such courts as it created. The minority agreed that Congress could abolish inferior courts created by it, but urged that the majority, under Chief Justice Marshall's theory of the inherent power of courts, were going too far in the curtailment of inherent equity power. The majority answered these arguments by pointing out that Chief Justice Marshall's theory had never actually been the law, citing *Cary v. Curtis*, 3 How. 236, and *Myers v. United States*,<sup>9</sup> 272 U.S. 52. The majority also relied heavily on *Michaelson v. United States*, 266 U.S. 42.<sup>10</sup>

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<sup>9</sup> The Senate Report, at page 10, cites the following statement from the *Myers* case:

... It is clear that the mere establishment of a Federal inferior court does not vest that court with all the judicial power of the United States as conferred in the second section of Article III but only that conferred by Congress specifically on the particular court. It must be limited territorially and in the classes of cases to be heard; and the mere creation of the court does not confer jurisdiction except as it is conferred in the law of its creation or its amendments.

It also quotes the following language from the *Cary* case:

The judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.

<sup>10</sup> In the *Michaelson* case, the Supreme Court upheld the power of Congress in the Clayton Act to require jury trial in contempt cases growing out of labor disputes.

The majority drafted the legislative definition of courts based on the language in these Supreme Court cases.

Of course, it has never even been suggested that legislative courts as distinguished from constitutional courts are not subject to plenary control by Congress in all respects.

It was clearly then the constitutional issue that focused the Congressional drafters' attention on inferior federal courts created under Article III.

Mr. LaGuardia indicated that Congress was concerned primarily with its power: "This bill does not take one iota of jurisdiction — *because we have not the power* — from state courts, and does not change any state law."<sup>11</sup>

The legislative debates leave no doubt that Congress would have taken jurisdiction from state courts if it had the power, because Congress was adopting as law the dissenting opinions of Justice Brandeis which branded the issuance of labor injunctions a spurious use of equity power and was legalizing the kind of conduct formerly declared illegal by courts, which Justice Brandeis said "reminds of involuntary servitude."

The expert counsel to both the House and Senate committees, Justice Frankfurter, summarized well the attitude of Congress towards labor injunctions:

In labor cases, however, complicating factors enter. The injunction cannot preserve the so-called status quo; the situation does not remain

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<sup>11</sup> Congressional Record, Vol. 75, part 5, page 5478.

in equilibrium awaiting judgment upon full knowledge. The suspension of activities affects only the strikers; the employer resumes his efforts to defeat the strike, and resumes them free from the interdicted interferences. Moreover, the suspension of strike activities, even temporarily, may defeat the strike for practical purposes and foredoom its resumption, even if the injunction is later lifted.<sup>12</sup>

There is not one word in the whole legislative history of the Act that indicates an intention to exercise less than the full power of Congress. There is not one word indicating an intention to exclude the federal and local courts of territories from the operation of the Act nor to withhold from the 3,000,000 residents of territories the benefit of the rights created by the Act.

Of course, appellants contend that the full and natural meaning of the legislative definition comprehends the territorial federal district court, and the circuit and supreme courts of the territory, all of which were created by Congress, and whose jurisdiction was and may be conferred *and* defined *and* limited by Congress, whose judges are appointed by the President with the advice and consent of the Senate, and whose salaries are paid by Congress.<sup>13</sup>

If the court believes that the reference to inferior federal courts created under Article III in the Senate and House Reports indicates that Congress was not

<sup>12</sup> Frankfurter and Greene, "The Labor Injunction," page 201.

<sup>13</sup> The Territorial Attorney General has ruled that the salaries of judges cannot be supplemented or added to by the Territorial Legislature.

thinking of, or considering, federally created courts in the territories, it seems to appellants that the Supreme Court's canon of construction of this Act—that even if Congress had no consciousness of intention relating to these courts and omitted meticulous words except as to those courts which came most readily to mind—should be invoked to put into effect in the Territory of Hawaii the public policy of the United States.

The court relies upon the curiously uncoded definition of "courts of the United States" set forth in 50 Stat. 753,<sup>14</sup> to indicate the kind of a statute Congress might have drawn if it intended to include territorial courts within the purview of the legislative definition. This statute, of course, was passed in 1937, five years after the adoption of the Norris-LaGuardia Act. It seems to appellants, however, that if this definition throws any light upon the question here presented, it is that there is no insurmountable obstacle, constitutional or verbal, to describing a territorial court as a "court of the United States." There is just a question of ascribing to the word "of" the sense of belonging, rather than considering the four words "of the United States" in a hyphenated adjectival sense to create technical meaning. (Query whether "courts of record of Hawaii" was intended to include the Hawaiian circuit and supreme courts only, and its Federal District Court was intended to be included in "any district court of the United States," or whether "courts of

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<sup>14</sup> Of course, Congress has provided for Hawaii, Alaska and Puerto Rico considerably variegated judicial systems.



record of Hawaii" is intended to include all three. In any event, it is clear that Congress took no chances that any of its creatures should hastily or improvidently interfere with its legislation. It is to be remembered that this Act was passed during the course of the New Deal fight with the Supreme Court over the upholding of measures of broad social policy, such as the Norris-LaGuardia Act, the National Labor Relations Act and the Agricultural Adjustment Act.)

### III

**CONGRESS ITSELF RECOGNIZED THAT THE APPELLATE PROVISIONS OF THE ACT WERE OF LITTLE MOMENT IN VIEW OF THE NATURE OF THE SUBJECT MATTER, AND HENCE, THE APPELLATE PROCEDURAL SECTIONS RELIED ON BY THE COURT, AS WELL AS THE PROCEDURAL LANGUAGE IN RESPECT TO THE RIGHT OF JURY TRIAL, SHOULD BE GIVEN NO DETERMINATIVE WEIGHT ON THE QUESTION OF THE APPLICATION OF THE ACT TO THE TERRITORY.**

We have the word of Senator Walsh of the Senate Judiciary Committee that Congress regarded this procedural appeal section as inconsequential and the substantive rights as all important:

We have endeavored in the framing of the bill to take care of the matter of appeals as best we possibly can; but no matter what we do about it, the appeal is no relief whatever, as the thing is all ended long before the appeal can be heard either one way or the other. Either the strike prevails or it does not prevail, *so the*

*matter of appeal is of no particular consequence.* (Cong. Rec. Vol. 75, part 5, p. 4930.)

Assuming an ambiguity in the legislative definition, a failure or defect of a procedural character in respect to appeals cannot properly be used to diminish the scope of the act and destroy substantive rights created by it. Federal courts are always alert to provide a forum to protect substantive rights. If these appellate provisions are inappropriate to territorial courts, the difficulty can be obviated by holding this section inapplicable to this situation<sup>15</sup> or a court direct that the procedure in ordinary cases, i.e., appeal, first to the territorial supreme court from circuit courts, should govern with the expedition features being given effect.

The use of the words "state and district" in Section 11 likewise represent merely the procedural aspects of the substantive right to a jury trial in contempt cases. In the recent decision in the Andres case<sup>16</sup> the Supreme Court found no difficulty in carrying out a uniform policy in respect to death penalties in the Territorial District Court as elsewhere in federal district courts, even though the "meticulous" word Territory was omitted.

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<sup>15</sup> See Section 14, which provides: If any provision of this Act (Chapter) or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of the Act (Chapter) and the application of such provisions to the other persons or circumstances shall not be affected thereby.

<sup>16</sup> *Andres v. Territory of Hawaii*, 92 Law. Ed. Advance Sheets 790.

## IV

THE COURT MISUNDERSTOOD APPELLANTS' CONTENTION WITH RESPECT TO CONDITIONS OF LABOR IN HAWAII IN 1932. APPELLANTS URGED THAT CONGRESS WAS AWARE OF THESE CONDITIONS AND HAD SHOWN THIS AWARENESS BY EXTENDING TO THE TERRITORY EVERY ACT OF NATIONAL LABOR LEGISLATION, SUCH AS THE CLAYTON ACT AND THE RAILWAY LABOR ACT, FROM ANNEXATION IN 1900 TO 1932. THE SAME CONGRESS EXTENDED SECTION 7 OF THE NATIONAL INDUSTRIAL RECOVERY ACT TO THE TERRITORY, AND LATER, THE NATIONAL LABOR RELATIONS ACT AND THE FAIR LABOR STANDARD ACTS. ALL THESE ACTS APPLY TO THE TERRITORY IN THE BROADEST SCOPE POSSIBLE, AND IN A BROADER SCOPE THAN THEY APPLY TO THE STATES. IN THE STATES, THESE ACTS AFFECT ONLY EMPLOYERS AND EMPLOYEES ENGAGED IN INTERSTATE COMMERCE; IN THE TERRITORY, THEY AFFECT EMPLOYERS AND EMPLOYEES IN INTRA-TERRITORIAL COMMERCE AS WELL AS COMMERCE BETWEEN THE TERRITORY AND THE SEVERAL STATES, AND THEY THUS COVER EVERY PHASE OF EMPLOYER-EMPLOYEE RELATIONSHIP IN THE TERRITORY, EXCEPTING ONLY IN RESPECT TO INDUSTRIES EXEMPTED FROM THE COVERAGE OF THE ACTS, SUCH AS AGRICULTURE.

APPELLANTS URGE THAT IN THE LIGHT OF THIS FIXED, UNDEVIATING POLICY OF EXTENDING NATIONAL LABOR LEGISLATION TO THE TERRITORY, AN INTENT TO EXCLUDE THE LABORING MEN OF THE TERRITORY FROM ONE OF A SERIES OF INTERRELATED ACTS AFFECTING LABOR SHOULD NOT BE PRESUMED IN THE ABSENCE OF ANY FACT MAKING THAT EXCLUSION MANDATORY.

On annexation of the Territory, Congress immediately took cognizance of the conditions of labor and in the Organic Act<sup>17</sup> itself, relieved workers from the serfdom of indentured labor contracts.<sup>18</sup>

Labor in the Territory organized or attempted to organize, and to strike before the passage of the Norris-LaGuardia Act. There were Territory-wide organizations and Territory-wide strikes even on plantations, but these organizations could not withstand the combined power of the employer and the Government. This combined power was perhaps most frequently exercised in labor disputes on the criminal side of the court, the employer-paid lawyers being designated by the Attorney General as special prosecutors of "higher wage conspiracies" and unlawful assemblies.

The labor injunction, however, was likewise frequently employed when no criminal charge could be found or fabricated. On July 9, 1909, for example, during the 1909 Japanese strike, a Circuit Court judge issued an injunction against the *Nippu Jiji*, a Japanese newspaper, ordering it to put an end to articles that included threats of boycott or ostracism, and enjoining 33 strike leaders from committing

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<sup>17</sup> Section 10, which provides in part: "That no suit or proceeding shall be maintained for the specific performance of any contract heretofore or hereafter entered into for personal labor or services, nor shall any remedy exist or be enforced for breach of any such contract except in a civil suit or proceeding instituted solely to recover damages for such breach," and further declaring contracts for personal services for a definite term made after August 12, 1898, null and void.

<sup>18</sup> The Report of the Attorney General of the Territory in 1890 shows that 5,387 persons were convicted for violation of these contracts for the biennial period ending March 31, 1890.

any acts of violence and from picketing any places where employees of the Oahu Sugar Company and other Japanese laborers frequented for the purpose of intimidating them.<sup>19</sup>

Between 1932 when the Norris-LaGuardia Act was passed, and 1938, counsel has been able to find no record of an injunction being issued in a case growing out of a labor dispute. In 1938, when an injunction was applied for to prohibit picketing, the injunction was denied by then Circuit Court Judge LeBaron who wrote the opinion below on the ground that the Norris-LaGuardia Act removed jurisdiction from the Circuit Court to issue such injunctions.<sup>20</sup>

From 1938, when Judge LeBaron ruled the Norris-LaGuardia Act applicable to circuit courts of the Territory, until 1946, no injunctions were issued in labor disputes, until Judge Rice, and then Judge Wirtz, granted ex parte restraining orders without complying with the Norris-LaGuardia Act.

## V

**THE COURT MISUNDERSTOOD, AND CONSEQUENTLY DID NOT GIVE CONSIDERATION TO, APPELLANTS' CONTENTION WITH RESPECT TO THE APPLICATION OF THE SHERMAN AND CLAYTON ACTS, AND THE AMENDATORY NORRIS-LAGUARDIA ACT TO THE TERRITORY OF HAWAII.**

This contention has a twofold aspect: First, the substantive rights created by these acts specifically

<sup>19</sup> Pacific Commercial Advertiser, July 9, 1909.

<sup>20</sup> See Appendix for full text of this opinion.

inure to persons in the Territory.<sup>21</sup> Consequently, no territorial court has jurisdiction to enjoin the exercise of these federal substantive rights, regardless of whether the procedural provisions of the Act apply in terms to these courts. Second, the procedural limitations apply to territorial courts, including circuit courts in issuing injunctions in labor disputes. Both contentions go to the question of jurisdiction of the court. No court has jurisdiction to enjoin lawful conduct.

Even if the court holds to the construction it has given of the legislative definition, consideration should be given to the question of jurisdiction raised by appellants' argument on substantive rights.

The Sherman Act of July 2, 1890, was in force at the time of the annexation of the Republic of Hawaii to the United States. The Sherman Act specifically applied to commerce in and within Territories of the United States. It became a part of the laws of the Territory by virtue of the provisions of Section 5 of the Organic Act.<sup>22</sup>

When the Clayton Act was adopted on October 15, 1914, its provisions relating both to monopolies and conspiracies in restraint of trade and to labor's rights were respectively applicable to commerce in and within the territory, and to all persons, associations and corporations in the Territory.

The Supreme Court has specifically held that the unenjoinable conduct in the Clayton Act as redefined in the Norris-LaGuardia Act is legal under all

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<sup>21</sup> 29 U.S.C.A. 52, 53.

<sup>22</sup> 48 U.S.C.A. 495.

laws of the United States, including the Sherman Act. The Territorial legislature cannot legalize the illegal acts in the anti-trust provisions of the act, nor can it make illegal the trade union activity that is specifically legalized.

Since the Norris-LaGuardia Act amends these two Acts and since its purpose was to restore the broad purposes which Congress thought it had formulated by Sections 6 and 20 of the Clayton Act, the later act must be given the same scope geographically and as to persons affected as the two preceding acts.

Appellants make no contention, as the court seems to assume, that powers to enforce the provisions of the anti-trust laws or the procedural and jurisdictional limitations set forth in Section 20 of the Clayton Act apply to territorial circuit courts. But appellants do contend that the words "courts of the United States" in Section 20 includes the territorial federal district court, and the phrase "any district court of the United States" used elsewhere in the act includes the territorial federal district court, and that this Act being applicable to the Territory, the substantive rights under it are effective in the Territory.

Since these laws are specifically "locally applicable," all territorial law must be consistent with them. For any territorial agent, legislative, executive or judicial, exercising power delegated by Congress to attempt to declare conduct Congress has declared legal a crime or to deny the right to engage in the conduct by restraining it would not be consistent

with these laws. In other words, so far as the Territory is concerned, Congress in the Organic Act placed laws of the United States "not locally in-applicable" on the same plane as the Constitution.

Prior to the passage of the Clayton and Norris-LaGuardia Act, territorial circuit courts had equitable jurisdiction "according to the usage and practice of courts of equity . . ." <sup>23</sup> The cases that Congress legislatively disapproved, restraining strikes, picketing, communication or association either on the ground that they were criminal conspiracies or in violation of the anti-trust laws from the first case in 1893 applying the Sherman Act to union activity through the Bedford Cut Stone case represent the "usage and practice of courts of equity" in issuing injunctions in labor disputes. The Norris-LaGuardia Act was passed because Congress believed that "the usage and practice of courts of equity" in issuing injunctions in labor disputes, and punishing strikers for contempt of such injunctions "violated the conscience of civilization." <sup>24</sup>

Senator Norris, in presenting the bill to the Senate, stated:

Section 5 says that the doing of these acts shall not be held by a court to be a conspiracy. *In Section 4 we already say they are legal* and no injunction shall be issued against anyone, even though there are several of them who have agreed to unite in any one of them.

<sup>23</sup> Revised Laws of Hawaii, 1945, Section 12402.

<sup>24</sup> Senate Report, *op. cit.*, p. 18.



And after quoting with explanatory comments each of the "legal" provisions of Section 4:

Is there anybody who objects to any one of those recitals? Is there any one of them that is unfair? This amendment simply provides that *two or more* laboring men who agree to do any one of the acts I have enumerated shall not be held to be guilty of a conspiracy. What is wrong about that? I ask any fair-minded man on earth? In any other case except a case involving a labor dispute one would be laughed out of court if he tried to charge a conspiracy on evidence as to any of the acts enumerated in the provisions I have read. Such a charge would apply nowhere and never has been made, so far as I know, except against men who toil, and as a rule, against men who toil down in the bowels of the earth in the mines.

Senator Bratton asserted:

The difference is that *the acts enumerated in section four* are perfectly legal.

Senator Norris replied:

We have declared them to be so, although it ought not to be necessary to do so.<sup>25</sup>

If a territorial circuit court judge can issue an ex parte restraining order, providing

You are hereby ordered to limit the number of pickets which you shall use to not more than three (3) pickets stationed at points of ingress and egress,

<sup>25</sup> Congressional Record, Volume 75, part 5, p. 4931.

labor in Hawaii is back to the point at which Congress began in the Clayton Act, back to the days when picketing was "sinister," a lone "missionary" only being allowable.

If this can be, Judge Benson Hough aptly wrote the law and epitaph for labor in the Territory in his injunction against the United Mine Workers which Congress condemned as one of the worst:

Persuasion in the presence of three of more persons congregated with the persuader is not peaceful persuasion, and is hereby prohibited.<sup>26</sup>

## VI

THE DECISION OF THIS COURT, RESTING AS IT DOES ON THE PROPOSITION THAT THE NORRIS-LAGUARDIA ACT APPLIES ONLY TO INFERIOR FEDERAL COURTS CREATED UNDER ARTICLE III OF THE CONSTITUTION, IS IN CONFLICT WITH AN UNAPPEALED, AND UNCONTESTED RULING OF THE FEDERAL DISTRICT COURT OF THE TERRITORY OF HAWAII IN *Alesna v. Rice*, No. 11, 872 IN THE RECORDS OF THIS COURT, AS WELL AS WITH *Hall v. Hawaiian Pineapple Co.*, 72 F. Supp. 533.

Those cases hold that the Norris-LaGuardia Act applies to the Territory and limits the jurisdiction of the federal District Court of the Territory in the issuance of injunctions in labor disputes. The territorial federal district court is a legislative court created under Article IV of the Constitution, as are the territorial circuit and supreme courts. The

<sup>26</sup> Frankfurter & Greene, *The Labor Injunction*, Appendices, p. 266.

court's decision cannot rest on the proposition that Congress intended to affect only inferior federal courts under Article III without nullifying the express provisions of the Clayton Act, and the Norris-LaGuardia Act in its entirety in the Territory.

Appellants believe that the court will find that the issues raised in *Alesna v. Rice* present all aspects of the question of the application of these inter-related Acts to the Territory.

### CONCLUSION

For the foregoing reasons appellants respectfully request the court to grant their petition for a rehearing and reargument in this case.

If the court sees fit to grant this petition, appellants respectfully suggest that reargument be consolidated with the argument in *Alesna v. Rice*, now set for December 9, 1948.

Dated: Honolulu, T. H., November 10, 1948.

Respectfully submitted,

HARRIET BOUSLOG,  
*Attorney for Appellants.*

I hereby certify that the within petition for rehearing is not interposed for purposes of delay.

HARRIET BOUSLOG,  
*Attorney for Appellants.*



## Appendix



IN THE

# Circuit Court of the First Judicial Circuit

TERRITORY OF HAWAII

At Chambers in Equity

JOSEPH F. NEVES and LEWIS PERKINS WILLIAMS,  
copartners doing business as RIALTO BEER  
GARDEN,

*Petitioners,*

vs.

CARL REBER, ALBERT (ALKY) DAWSON, JOHN  
SANTIAGO GOMES, WILBUR K. HALL, BELLA  
MOORE, ALICE HAVENS, CHESTER PERKOW-  
SKY, MADELINE MORRIS, WHITEY ALLEN, ROY  
OWENS, ART RUTLEDGE, ELMER WATKINS,  
JOHN DOE and RICHARD ROE, constituting  
the HOTEL, RESTAURANT AND BAR CATERING  
ASSOCIATION, LOCAL No. 5; and MARY MOE  
and DAN DOE,

*Respondents.*

Equity  
3948

Bill for  
Injunction  
and Other  
Relief

## DECISION ON MOTION

The sole question before this Court as raised by the Motion of the Petitioners is one of jurisdiction, i.e. jurisdiction to issue a restraining order upon the Motion for Temporary Restraining Order and Affidavits filed herein by the Petitioners without con-

forming with the provisions of the "Norris-LaGuardia Act."

The instant the "Norris-LaGuardia Act" was presented to this Court, it ruled from the bench that the Temporary Restraining Order, issued the day before, was issued in violation of the "Norris-LaGuardia Act" and dissolved said Restraining Order forthwith. In other words, the Court in effect ruled that this Court is a "court of the United States" as defined in said Act, and that therefore it did not have jurisdiction to so issue a restraining Order in this case without strict conformity with the provisions of the "Norris-LaGuardia Act."

The Motion of the Petitioners challenges the soundness of the Court's ruling from the bench, and its Order dissolving the Temporary Restraining Order, on the theory that this Court is not a "court of the United States" as defined in Section 113(d) of the "Norris-LaGuardia Act."

It is clear and it is conceded by the attorneys for the Petitioners as well as by the attorney for the Respondents that, if this Court is a "court of the United States" as defined in Section 113(d) of the "Norris-LaGuardia Act," it had not the jurisdiction to issue the Restraining Order in question without strict conformity with the provisions of the Act.

A casual reading of the Petition, Motion for a Temporary Restraining Order and Affidavits, together with Section 101 of the Act, will convince the most skeptical mind of this fact, for this clearly is a case involving or growing out of a labor dispute.



The provisions of Section 101 are as follows:

“... no court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter. (Mar. 23, 1932, c. 90, Par. 1, 47 Stat. 70.)”

The remaining question therefore to be answered, is whether or not this Court is a “court of the United States” within the meaning and definition of the Act. It will be noted that Congress, in using the term “court of the United States” in Section 101 of the Act, specifies it “as defined in this chapter.”

Within the same chapter, appears Section 113, which is obviously the definition referred to in Section 101, for paragraph (d) of Section 113 defines the term “court of the United States.” It reads as follows:

“Section 113. Definition of terms and words used in chapter. When used in this chapter, and for the purposes of this chapter \* \* \*

(d) The term “court of the United States” means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the Courts of the District of Columbia. (Mar. 23, 1932, c. 90, Par. 13, 47 Stat. 73.)”

Before attempting to construe the intent and meaning of this definition, it might be well to consider the pre-existing judicial constructions of the same term, i.e. "court of the United States" and the usual meaning and understanding which that term has previously been intended to have and to connote, by legislatures, by Congress and by judicial construction.

There can be no question that the term "court or courts of the United States" has gathered to it by usage, by popular understanding and by judicial construction a peculiar and well defined legal significance which connotes, describes and pictures the strictly Federal Courts of the United States and the Federal court system. These strictly Federal Courts are distinguished from the other courts of America by their name, such as the District Courts of the United States, and by their strictly Federal jurisdiction dealing with the laws of the United States. This term has therefore been used to only apply to this type of Federal Courts in spite of the fact that there are other courts of America which are also Federal in nature, as for example the Courts of the District of Columbia and the Territorial Courts of Hawaii. These latter Courts are not Federal in name nor in jurisdiction, but are Federal only to the extent that they are creatures of Congress and their Judges are appointed and receive their salary in the same manner as do the aforementioned strictly Federal Courts. Nevertheless, due to the name of the strictly Federal Courts and to their jurisdiction in administering the

laws of the United States, the strictly Federal Courts only have been so designated by the term "courts of the United States." Such clearly is the legal significance of this term outside of and apart from its use and definition in Chapter 6 of the "Norris-LaGuardia Act."

With this settled and pre-existing construction and understanding as to the meaning of this term, counsel for the Petitioners very timely presents the argument that "Congress in passing the Norris-LaGuardia Act must be presumed to have acted with knowledge of the recognized distinction between Courts of the United States . . . and Territorial Courts" and calls attention to the rule as stated in 59 Corpus Juris 1008 as follows: "Thus it has been presumed that a legislature in passing a statute, knew its own intention and of the judicial decisions under the pre-existing law" and that "in the construction of a statute it will be presumed that the legislature understood the meaning of the words used, that it intended to use them . . . in a technical sense, if they have a well settled technical meaning, or if they have a well defined legal significance, that they were used in that sense."

All these contentions and rules advanced by counsel for the Petitioners are sound and guide this Court in its construction of the definition before it.

However, it will be noted that the well defined legal significance of the term in question is a general one where the term is used with a certain degree of casualness in the body of the various legislative

acts, regulations and rules of court or wherever found. It was used as a term to divide and segregate all the American Courts into two large groups, i.e. Federal Courts and non-Federal Courts. It recognized the Courts in the Federal system as different and distinct from the Courts in the territorial, legislative and state systems.

To this general classification, which Congress is presumed to know, comes a more specific definition of the same term for the special use and purpose of a particular chapter in the "Norris-LaGuardia Act" of Congress. No one can doubt the power, right and propriety of Congress to thus make its own definition to carry out its own particular intent and purpose in any legislation.

This new definition may either broaden or narrow, or it may merely confirm the existing well defined legal significance which has attached itself to the term in question, but the new definition for obvious reasons must be conclusive for the particular use and purpose for which it is created.

Such a definition is Section 113(d) and the Court must therefore construe it as a definition.

There are two cardinal requirements of a definition. The first is that a definition should state the essential attributes of the thing to be defined by first placing it into the class or genus to which it belongs and then to enumerate the differentiae, or specific marks or traits which distinguish it from other members of the same class or genus.

The second cardinal requirement of a definition

is that it shall not contain the term or word to be defined, nor even any term or word which is directly synonymous with it.

With these two requirements the Court will look at the first part of the definition (d) of Section 113. It reads as follows:

“The term ‘court of the United States’ means any court of the United States . . .”

Under the first rule of definition cited, the words “any court of the United States” should be the class to which the term to be defined belongs.

The next part of the definition is the following clause:

“whose jurisdiction has been or may be conferred or defined or limited by Act of Congress . . .”

For the same reason this clause should be the differentiae or specific marks or traits which distinguish it from other members of the same class.

The last part of the definition is the following phrase:

“including the courts of the District of Columbia.”

This phrase should also be part of the differentiae and be descriptive of the term to be defined by setting out a type of court as an example meant in the rest of the definition.

Counsel for the Petitioners, however, argues that both terms, i.e. “court of the United States” used in the definition mean one and the same thing by virtue of the past well defined legal significance which has been attached to it and that Congress must be pre-

sumed to have so intended the term to mean strictly Federal Courts and that the inclusion of the courts of the District of Columbia by inference excludes the Territorial Courts. Such a construction of the definition would flagrantly violate the two cardinal requirements of a definition and is a clear case of reasoning in circles or begging the question, i.e. a form of *petitio principii* which would in turn completely annihilate Section 113(d) as an effective definition contrary to the plain and clear intention of Congress that it be a definition. It would in effect be construing Section 113(d) to make it say that strictly Federal courts mean strictly Federal courts. It would be attempting to define a term by means of the term itself. Such would destroy the meaning of the term or the *definiendum* and make of Section 113(d) a meaningless and unnecessary statement, contrary to the intention of Congress.

It is too well settled to admit of argument that a court should never so construe a legislative act as to make it into an absurdity. The Court therefore is forced by all the rules of logic and of construction to reject counsel's argument and will instead follow the plain and clear intention of Congress.

The key to the first of the definition of Section 113(d) is the meaning of the word "of." In using its definition and synonyms, the meaning of the entire Section becomes clear. The word "of" indicates origin or source. Thus the Court construes the intent and meaning of Congress to the first part of its definition to read as follows:

The term "court of the United States" means any court of or proceeding from or belonging to, or relating to or connected with or concerning the United States, etc.

Such a construction places the term to be defined into its proper class and makes Section 113(d) in its entirety into a sound and logical definition, which is clearly the intent of Congress.

The effect of this new definition of Congress is to broaden and enlarge upon the old definition, understanding and legal significance of the term in question, so that it shall include not only the strictly Federal Courts such as the District Courts of the United States, but also the non-strictly Federal Courts such as the Territorial Courts of Hawaii and the Courts of the District of Columbia. The definition in other words groups together all the Federal Courts of the United States whose jurisdiction has been or may be conferred, defined or limited by Act of Congress. Such a definition became absolutely necessary to Congress to carry out its intention and the policy of the United States. Otherwise the pre-existing and limited use and legal significance of this term would have defeated the intention and purpose of Congress.

This liberal and reasonable construction of a remedial Act designed to benefit the individual unorganized worker of the Nation from his apparent helplessness to exercise his actual liberty of contract and to protect his freedom of labor wherever there are courts whose source and origin proceed from the United States and whose jurisdiction is conferred,

defined or limited by Act of Congress, is clearly consistent with the policy of the United States as expressed in Section 102 of the "Norris-LaGuardia Act."

In the interpretation of Section 113(d), this policy of the United States is material for it shows a national application under the prevailing economic conditions of the United States to extend the benefits of the Act to all the intended recipients thereof under the flag of the United States wherever exists this broad type of Federal Court.

Such an interpretation explains why Congress added the last phrase to its definition in Section 113(d), i.e. "including the courts of the District of Columbia" as an example of the courts defined. In the District of Columbia is the Capital of the Nation, from which Congress clearly intended that the benefits of the Act should not only begin, but extend outwardly in the manner prescribed by the Act.

The remaining question is whether or not this Court as a Territorial Court comes within the definition of Congress.

First it is clear that it belongs to the general class of courts first stated in the definition. Its judges are appointed by the President of the United States by and with the consent and advice of the Senate of the United States, whose salaries are paid out of an appropriation by Congress by the Treasurer of the United States.

This Court also comes within the second and defining part of the definition of the Section in that its



jurisdiction was conferred by Act of Congress (Section 81 of the Organic Act) which granted to it part of the Judicial Power of the Territory and confirmed its jurisdiction by continuing it in force. This Court's jurisdiction has already been limited in the matter of divorce by Act of Congress (Section 55 of the Organic Act), which clearly shows the control of its jurisdiction by Congress and that Congress may at any time further limit or define its jurisdiction.

Consequently, this Court meets and comes within every phase of the definition given by Congress as well as the public policy of the United States as expressed by Congress.

Wherefore, this being a Court of the United States within the meaning and purview of the "Norris-LaGuardia Act," this Court was right in ordering that the Restraining Order be forthwith dissolved as contrary to Section 101 of the Act aforesaid.

This conclusively settles the question raised by the Motion of the Petitioners and therefore the matter of the applicability of the "Wagner Act" to Section 6120 R.L.H. 1935, known as the Picketing Law, need not be here decided.

WHEREFORE the Motion of Petitioners to set aside the Court's ruling dissolving the Temporary Restraining Order is overruled and denied.

DATED: Honolulu, T. H., June 21st, 1938.

LOUIS LE BARON  
First Judge, First Circuit Court,  
Territory of Hawaii.



No. 11571

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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PHILIP B. FLEMING, Administrator,  
Office of Temporary Controls,  
Appellant,  
vs.

EARL CHIN GOON, HARRY CHIN GOON,  
KAMERIOSHIM MAYEDA, HARRY MAY-  
EDA, individually and doing business as SING  
HOP CO., a partnership, and  
F. W. RUPPERT,  
Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division

PAUL P. O'BRIEN,



No. 11571

---

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

---

PHILIP B. FLEMING, Administrator,  
Office of Temporary Controls,  
Appellant,  
vs.

EARL CHIN GOON, HARRY CHIN GOON,  
KAMERIOSHIM MAYEDA, HARRY MAY-  
EDA, individually and doing business as SING  
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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division



# INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco, California,

Attorneys for Defendant and Appellees.

In the District Court of the United States for the  
Northern District of California, Southern  
Division

No. 24130-R

CHESTER BOWLES, Administrator, Office of  
Price Administration,

Plaintiff,

vs.

EARL GOON, HARRY GOON, KAMERIOSHIM  
MAYEDA, HARRY MAYEDA, individually  
and doing business as SING HOP CO., a part-  
nership, and F. W. RUPPERT,

Defendants.

## COMPLAINT FOR INJUNCTION AND TREBLE DAMAGES

### Count One

1. In the judgment of the Administrator, the defendants have engaged in acts and practices which constitute a violation of Section 4(a) of the Emergency Price Control Act of 1942, as amended (Pub. Law 421, 77th Cong., 2d Sess., C. 26, 56 Stat., 32), hereinafter called "the Act"; in that defendants have violated provisions of Maximum Price Regulation No. 165, as revised and amended, effective in accordance with the provisions of the Act; and therefore, pursuant to Section 205(a) of the Act, the Price Administrator brings this action to enforce compliance of Section 4(a) of said Act and the Regulation.

2. Jurisdiction of this action is conferred upon this Court by Section 205(c) of the Act. [1\*]

3. At all times mentioned there has been in effect, pursuant to the Act, Maximum Price Regulation No. 165, as revised and amended, establishing maximum prices on various services including services of packing, drying and dehydrating fruits, including apples.

4. Defendants, Earl Goon, Harry Goon, Kameri-oshim Mayeda, and Harry Mayeda, are partners doing business under the firm name and style of Sing Hop Company, a partnership in the City of Watsonville, County of Santa Cruz, State of California, and have been and now are engaged in the business of operating a dehydrating plant and performing, furnishing, selling and supplying services of dehydrating of various fruits, including apples, within the provisions of said Maximum Price Regulation No. 165, as revised and amended.

5. That since August 19, 1942 and up to the date hereof, defendants have violated said Regulation in that they have performed, furnished, sold and supplied services of dehydrating of certain fruits including apples, which services are subject to said Regulation, at prices in excess of the maximum prices permitted by said Maximum Price Regulation No. 165, as revised and amended.

6. That from and including September 10, 1942, defendants have failed and neglected to prepare and file with their appropriate War Price and Rationing Board a complete, correct and adequate

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\* Page numbering appearing at foot of page of original certified Transcript of Record.

statement of their maximum prices, rates and pricing methods for services supplied by defendants, as required by the provisions of Maximum Price Regulation No. 165, as revised and amended.

### Count Two

1. Plaintiff hereby realleges paragraphs 1, 3 and 4 of Count One and the same are herewith incorporated by reference and made a part hereof as though they were fully set forth herein. [2]

2. Jurisdiction of this Count is conferred upon this Court by Section 205 (c) and (e) of said Act.

3. None of the said sales and deliveries referred to in this said Count were made for use and consumption other than in the course of trade or business of the buyer.

4. Within one year last past, defendants doing business as Sing Hop Company, in Watsonville, California, performed, furnished, sold and supplied services of dehydrating of apples, within the provisions of Maximum Price Regulation 165, as revised and amended, and within the provisions of Order No. G-4 of Maximum Price Regulation 165, as amended, at prices in excess of the maximum prices established therefore, by said Maximum Price Regulation 165, as revised and amended, and said Order G-4. The amount by which the prices received by the defendants exceeded the maximum prices provided by said Regulation and said Order equals \$18,391.69.

5. Three times the aggregate amount by which the prices at which defendants sold the services referred to in paragraphs 3 and 4 of Count One of this Complaint exceed the maximum prices established by Maximum Price Regulation 165, as revised and amended, and Order G-4, as aforesaid, equals \$55,175.07.

Wherefore, the Administrator demands:

1. A Permanent Injunction enjoining the defendants, their agents, servants, employees and attorneys and all persons in active concert or participation with them, jointly or severally from:
  - a. Directly or indirectly performing, furnishing, selling and supplying services of dehydrating of fruits at prices in excess of those established by Maximum Price Regulation 165, as revised and amended, and Order No. G-4 thereunder, or otherwise violating or attempting or agreeing to do anything in violation of any Regulation or [3] Order adopted pursuant to said Act, establishing maximum prices for dehydrating services.
2. A Permanent Injunction requiring defendants to prepare and file with their appropriate War Price and Rationing Board, a complete, correct and adequate statement of their maximum prices, rates and pricing methods for dehydrating services supplied by defendants, as required by the provisions of Maximum Price Regulation 165, as revised and amended.

3. A Judgment on behalf of the United States against the defendants in the sum of \$55,175.00.
4. Such other, further and different relief as to the Court may seem just and proper in the premises.

Dated: This 20th day of December, 1944.

/s/ GEORGE A. FARADAY,  
/s/ W. H. BRUNNER,  
/s/ BETSY FITZGERALD RAHN.

[Endorsed]: Filed Dec. 20, 1944. [4]

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[Title of District Court and Cause.]

ANSWER OF DEFENDANTS HARRY CHIN  
GOON (herein sued as Harry Goon) and F. W.  
RUPPERT

Come now the above named defendants, Harry Chin Goon (herein sued as Harry Goon) and F. W. Ruppert, and answering the complaint on file herein admit, deny and allege as follows:

As to Count One of said complaint:

1. These defendants do not have sufficient knowledge, information or belief to enable them to answer the allegations contained in paragraph "1" of said Count, and therefore and upon that ground deny generally and specifically the allegations contained in said paragraph "1."
2. Admit the allegations contained in paragraph "2" and the paragraph numbered "3" of said Count One.

3. As to paragraph "4" of said Count One, said defendants admit that "defendants Earl Chin Goon (herein sued [5] as Earl Goon), Harry Chin Goon (herein sued as Harry Goon), Kam-erioshim Mayeda and Harry Mayeda are partners doing business under the firm name and style of Sing Hop Company, a partnership, in the City of Watsonville, County of Santa Cruz, State of California, and have been and now are engaged in the business of operating a dehydrating plant," but deny all other allegations contained in said paragraph "4."
4. Deny generally and specifically all allegations contained in the paragraph numbered "5" of said Count One.
5. Deny generally and specifically all of the allegations contained in paragraph "6" of said Count One.

As to Count Two of said complaint:

1. Defendants here reallege and repeat all allegations, denials and admissions contained in their foregoing answer to paragraphs "1," "3" and "4" of said Count One, and said allegations, admissions and denials are herewith incorporated by reference and made part hereof as though they were fully set forth herein.
2. Admit the allegations contained in paragraphs "2" and "3" of said Count Two.
3. Deny generally and specifically each and all of the allegations contained in paragraph "4" of said Count Two.

4. Deny generally and specifically each and all of the allegations contained in paragraph "5" of said Count Two.

### Special Defense

As a further, second and special defense to each of the counts set forth in the complaint on file herein, said defendants allege that the transactions referred to in each of said counts and each thereof occurred more than one year prior to December 20th, 1944, and that the same are and each thereof is barred by the statute of limitations. [6]

Wherefore, said defendants pray that plaintiff take nothing by his said complaint and that the said defendants have judgment against plaintiff for their costs of suit herein incurred.

GEO. M. NAUS and  
WYCKOFF, GARDNER,  
PARKER & BOYLE,  
Attorneys for said Defendants

Receipt of a copy of the foregoing Answer, this 16th day of March, 1945, is hereby acknowledged.

BETSY FITZGERALD RAHN,  
Attorney for Plaintiff.

[Endorsed]: Filed March 16, 1945. [7]



[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause having come on regularly for trial in the above named court on April 16, 17, 18 and 19, 1946; and plaintiff having then appeared by Morris D. Feldman, Esquire, his attorney, and defendants Earl Chin Goon, Harry Chin Goon and F. W. Ruppert having then appeared by Messrs. George M. Naus, Philip T. Boyle and Wyckoff, Gardner, Parker & Boyle, their attorneys; and defendants Kamerioshim Mayeda and Harry Mayeda having then appeared by Messrs. R. H. Hudson and Sans, Hudson & Perry, their attorneys; and the cause having proceeded to a trial of the issues raised by plaintiff's complaint and the separate answers of defendants thereto; and evidence, [8] oral and documentary, having been received, and the cause having been argued and submitted for decision, the court now makes findings of facts and conclusions of law as follows:

## FINDINGS OF FACT

### I.

In the judgment of plaintiff as Administrator of the office of Price Administration, the defendants have engaged in acts and practices which constitute a violation of Section 4(a) of the Emergency Price Control Act of 1942, as amended (50 U.S.C. Appendix, §§ 902-945, Pub. Law 421, 77th Cong. 2d Sess., 56 Stat. 23), and plaintiff therefore brings this

action for an injunction and treble damages on behalf of the United States pursuant to Sections 205(a) and 205(e) of said Price Control Act.

## II.

Jurisdiction of this action is conferred upon this court by Sections 205(c) and 205(e) of said Price Control Act.

## III.

Prior to the happening of the transactions herein-after mentioned, plaintiff as Administrator of the Office of Price Administration had promulgated pursuant to said Price Control Act, and at all times herein mentioned there was in effect, Maximum Price Regulation No. 165, as revised and amended, and Order No. G-4 issued pursuant to Maximum Price Regulation No. 165, establishing maximum prices on various services, including the services of dehydrating or drying certain fruits, including apples. [9]

## IV.

At all times herein mentioned defendants Earl Chin Goon, Harry Chin Goon, Kamerioshim Mayeda and Harry Mayeda were co-partners doing business under the fictitious name of Sing Hop Co., and were engaged in the business of operating in the City of Watsonville, County of Santa Cruz, State of California, a dehydrating plant, and were there selling and supplying the services of dehydrating various fruits, including apples, covered by the provisions of Maximum Price Regulation No. 165, as revised and amended, and Order No. G-4 issued pursuant thereto.

At all times herein mentioned defendant F. W. Ruppert was employed as a salesman by the other defendants who were doing business under the fictitious name of Sing Hop Co.

#### V.

Since August 19, 1942, and prior to the commencement of this action the defendants have violated the provisions of Maximum Price Regulation No. 165, as revised and amended, and Order No. G-4 issued pursuant thereto, in that during said period the defendants have sold and supplied the services of dehydrating apples at prices in excess of the maximum prices permitted by Maximum Price Regulation No. 165, as revised and amended, and Order No. G-4 issued pursuant thereto.

#### VI.

In the fall of 1943 P. M. Resetar delivered to the dehydrating plant of defendants Goon and Mayeda, co-partners doing business as Sing Hop Co., the 1943 crop of apples grown by said P. M. Resetar, aggregating approximately 801 tons (green), and requested said defendants to dehydrate [10] said crop of apples. Said P. E. Resetar then and there agreed to pay said defendants for their services in drying said apples the maximum price permitted for such services for the 1943 crop pursuant to Maximum Price Regulation No. 165, as revised and amended, and Order No. G-4 issued pursuant thereto.

Thereafter defendants Goon and Mayeda, co-partners doing business as Sing Hop Co., did receive

and dehydrate the 1943 apple crop of said P. M. Resetar, and derived therefrom 100.125 tons of dry apples.

Thereafter and on or about April 5, 1944, defendants Goon and Mayeda, co-partners doing business as Sing Hop Co., demanded and received from said P. M. Resetar a total price or consideration of \$18,397.69 for the services of said defendants in drying or dehydrating said 1943 apple crop.

The maximum price established by Maximum Price Regulation No. 165, as revised and amended, and Order No. G-4 issued pursuant thereto for the services of dehydrating or drying apples for the 1943 season by defendants Goon and Mayeda, co-partners doing business as Sing Hop Co., was the sum of \$114.23 per ton of dry apples, or the total sum of \$11,437.28 for the 100.125 dry tons of said P. M. Resetar's apples so dehydrated.

The total price or consideration so demanded and received by said defendants from said P. M. Resetar for the drying of said apples, to wit, \$18,397.69, exceeded by \$6,960.41 the total maximum price of \$11,437.28 established therefor by Maximum Price Regulation No. 165, as revised and amended, and Order No. G-4 issued pursuant thereto.

The overcharge of \$6,960.41 herein found to have been exacted by defendants Goon and Mayeda, co-partners doing business as Sing Hop Co., was willful and is the [11] result of failure on the part of said defendants to take practicable precautions against the occurrence of said violation.

## VII

In the fall of 1943 L. G. Bachan delivered to the dehydrating plant of defendants Goon and Mayeda, co-partners doing business as Sing Hop Co., the 1943 crop of apples grown by L. G. Bachan, aggregating approximately 83 tons (green), and requested said defendants to dehydrate said crop of apples. Said L. G. Bachan then and there agreed to pay said defendants for their services in drying said apples the maximum price permitted for such services for the 1943 crop pursuant to Maximum Price Regulation No. 165, as revised and amended, and Order No. G-4 issued pursuant thereto.

Thereafter defendants Goon and Mayeda, co-partners doing business as Sing Hop Co., did receive and dehydrate the 1943 apple crop of said L. G. Bachan, and derived therefrom 10.337 tons of dry apples.

Thereafter and on or about March 15, 1944, defendants Goon and Mayeda, co-partners doing business as Sing Hop Co., demanded and received from said L. G. Bachan a total price or consideration of \$1,899.42 for the services of said defendants in drying or dehydrating said 1943 apple crop.

The maximum price established by Maximum Price Regulation No. 165, as revised and amended, and Order No. G-4 issued pursuant thereto for the services of dehydrating or drying apples for the 1943 season by defendants Goon and Mayeda, co-partners doing business as Sing Hop Co., was the sum of \$114.23 per ton of dry apples, or the total

sum of \$1,180.79 for the 10.337 dry tons of said L. G. Bachan's apples so dehydrated.

The total price or consideration so demanded and received by said defendants from said L. G. Bachan for the drying of said apples, to wit, \$1,899.42, exceeded by \$718.63 the total maximum price of \$1,180.79 established therefor by Maximum Price Regulation No. 165, as revised and amended, and Order No. G-4 issued pursuant thereto.

The overcharge of \$718.63 herein found to have been exacted by defendants Goon and Mayeda, co-partners doing business as Sing Hop Co., was willful and is the result of failure on the part of said defendants to take practicable precautions against the occurrence of said violation.

### VIII.

In the fall of 1943 M. Zupan delivered to the dehydrating plant of defendants Goon and Mayeda, co-partners doing business as Sing Hop Co., the 1943 crop of apples grown by M. Zupan, aggregating approximately 69½ tons (green), and requested said defendants to dehydrate said crop of apples. Said M. Zupan then and there agreed to pay said defendants for their services in drying said apples the maximum price permitted for such services for the 1943 crop pursuant to Maximum Price Regulation No. 165, as revised and amended, and Order No. G-4 issued pursuant thereto.

Thereafter defendants Goon and Mayeda, co-partners doing business as Sing Hop Co., did receive and dehydrate the 1943 apple crop of said M. Zupan,

and derived therefrom 8.697 tons of dry apples.

Thereafter and on or about March 15, 1944, defendants Goon and Mayeda, co-partners doing business as Sing Hop Co., demanded and received from said M. Zupan a total [13] price or consideration of \$1,598.51 for the services of said defendants in drying or dehydrating said 1943 apple crop.

The maximum price established by Maximum Price Regulation No. 165, as revised and amended, and Order No. G-4 issued pursuant thereto for the services of dehydrating or drying apples for the 1943 season by defendants Goon and Mayeda, co-partners doing business as Sing Hop Co., was the sum of \$114.23 per ton of dry apples, or the total sum of \$993.46 for the 8.697 dry tons of said M. Zupan's apples so dehydrated.

The total price or consideration so demanded and received by said defendants from said M. Zupan for the drying of said apples, to wit, \$1,598.51, exceeded by \$605.05 the total maximum price of \$993.46 established therefor by Maximum Price Regulation No. 165, as revised and amended, and Order No. G-4 issued pursuant thereto.

The overcharge of \$605.05 herein found to have been exacted by defendants Goon and Mayeda, co-partners doing business as Sing Hop Co., was willful and is the result of failure on the part of said defendants to take practicable precautions against the occurrence of said violation.

## IX.

None of the services hereinabove mentioned were

sold, or delivered, or performed, or purchased, for use or consumption other than in the course of trade or business.

### X.

Except to the extent hereinabove expressly found to be true, the court finds that the remaining allegations contained in paragraph 6 of Count One of plaintiff's complaint and in paragraphs 4 and 5 of Count Two of plaintiff's [14] complaint are not established by a preponderance of the evidence, and therefore finds such remaining allegations not true.

## CONCLUSIONS OF LAW

### I.

All transactions referred to in the foregoing findings were, at all times mentioned, subject to the provisions of Maximum Price Regulation No. 165, as revised and amended, and Order No. G-4 issued pursuant thereto, since the services sold, or delivered, or performed constituted a "commodity" within the meaning of Section 302(c) of the Emergency Price Control Act of 1942 as amended (50 U.S.C. Appendix, § 942(c)), and none of the services involved were sold, or delivered, or performed, or purchased, for use or consumption other than in the course of trade or business.

### II.

Each overcharge hereinabove found constitutes a violation of Maximum Price Regulation No. 165, as revised and amended, and Order No. G-4 issued pursuant thereto.



## III.

Each violation of Maximum Price Regulation No. 165, as revised and amended, and Order No. G-4 issued pursuant thereto, hereinabove found to have been committed by defendants Goon and Mayeda, co-partners doing business as Sing Hop Co., was willful and is the result of failure on the part of said defendants to take practicable precautions against the occurrence of said violation.

## IV.

By reason of the overcharges aggregating \$8,284.09, hereinabove found to have been exacted by defendants Goon and Mayeda, co-partners doing business as Sing Hop Co., [16] plaintiff as Administrator of the Office of Price Administration is entitled to judgment on behalf of the United States against defendants Earl Chin Goon, Harry Chin Goon, Kamerioshim Mayeda and Harry Mayeda for double the amount of such overcharges, or the total sum of \$16,568.18.

## V.

Defendant F. W. Ruppert acted as salesman for defendants Goon and Mayeda, co-partners doing business as Sing Hop Co. Defendants Goon and Mayeda were the "sellers" or the "persons selling a commodity" within the meaning of Section 205(e) of the Emergency Price Control Act of 1942 as amended (50 U.S.C. Appendix, § 925(e)). Only the seller is liable for damages pursuant to the provisions of Section 205(e). The Administrator may proceed against salesmen or agents of the seller by

way of injunction under Section 205(a) or by criminal prosecution under Section 205(b). Accordingly, judgment should be entered dismissing this action for damages as against defendant F. W. Ruppert.

## VI.

By reason of the violations hereinabove found, plaintiff is entitled to permanent injunction enjoining and restraining defendants Earl Chin Goon, Harry Chin Goon, Kamerioshim Mayeda, Harry Mayeda and F. W. Ruppert, and each of them, and the agents, servants, employees and attorneys of each of them, and all persons in active concert or participation with all or any of them, from directly or indirectly in any way or manner performing, or furnishing, or selling, or delivering, or supplying the services of dehydrating of fruits at any time or for any person at prices in excess of those established by Maximum Price Regulation [17] No. 165, as revised and amended, and Order No. G-4 issued pursuant thereto, and from otherwise violating or attempting or agreeing to do anything in violation of said Regulation or Order, or any amendment thereof or supplement thereto, establishing maximum prices for the services of dehydrating various fruits.

Let judgment be entered accordingly.

October 30, 1946.

WM. C. MATHES,

Judge.

[Endorsed]: Filed Nov. 4, 1946. [18]

In the District Court of the United States, Northern  
District of California, Southern Division

No. 24130-WM

PAUL A. PORTER, Administrator, OFFICE OF  
PRICE ADMINISTRATOR,

Plaintiff,

vs.

EARL CHIN GOON, HARRY CHIN GOON,  
KAMERIOSHIM MAYEDA, HARRY MAY-  
EDA, individually and doing business as SING  
HOP CO., a partnership, and  
F. W. RUPPERT,

Defendants.

### JUDGMENT

The Court having made and filed findings of fact and conclusions of law herein, and having ordered entry of judgment in accordance therewith;

It Is now Ordered, Adjudged and Decreed that a writ of injunction issue enjoining and restraining the defendants Earl Chin Goon, Harry Chin Goon, Kamerioshim Mayeda, Harry Mayeda and F. W. Ruppert, and each of them, and the agents, servants, employees and attorneys of each of them, and all persons in active concert or participation with all or any of them, from directly or indirectly in any way or manner performing, or furnishing, or selling, or delivering, or supplying the services of dehydrating of [19] fruits at any time or for any

person at prices in excess of those established by Maximum Price Regulation No. 165, as revised and amended, and Order No. G-4 issued pursuant thereto, and from otherwise violating or attempting or agreeing to do anything in violation of said Regulation or Order, or any amendment thereof or supplement thereto, establishing maximum prices for the services of dehydrating various fruits.

It Is Further Ordered, Adjudged and Decreed that the foregoing injunction shall terminate upon the expiration or earlier termination of all regulations promulgated by the Administrator of the Office of Price Administration establishing maximum prices for the service or commodity referred to therein.

It Is Further Ordered, Adjudged and Decreed that plaintiff, Paul A. Porter as Administrator of the Office of Price Administration, on behalf of the United States have and recover of and from defendants Earl Chin Goon, Harry Chin Goon, Kamerio-shim Mayeda, Harry Mayeda, and each of them, the sum of \$16,568.18, and the plaintiff's costs in this action incurred, as taxed by the Clerk, in the sum of \$

It Is Further Ordered, Adjudged and Decreed that this action be and is hereby dismissed in so far as damages are sought against F. W. Ruppert.

October 30, 1946.

WM. C. MATHES,  
Judge.

[Endorsed]: Filed and Entered Nov. 4, 1946.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Philip B. Fleming, Administrator, Office of Temporary Controls, plaintiff above named, appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 4, 1946, dismissing said action against the defendant, F. W. Ruppert, and from so much of the judgment as denies recovery of statutory damages in excess of \$16,568.18 of plaintiff's claim.

Dated at San Francisco, California, January 28, 1947.

AUSTIN CLAPP,

WILLIAM B. WETHERALL,

CECIL F. POOLE,

By /s/ CECIL F. POOLE,

Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 28, 1947. [22]

[Title of District Court and Cause.]

### STATEMENT OF POINTS ON APPEAL

The following is a statement of the points upon which plaintiff intends to rely on this appeal:

1. The Court below erred in holding that defendant F. W. Ruppert, acting as a salesman and agent for his co-defendant, was not a "seller" in the meaning of Section 205(e) of the Emergency Price Control Act, as amended.
2. The Court below erred in dismissing the action for damages as against the defendant F. W. Ruppert.

Dated February 19, 1947.

AUSTIN CLAPP,  
WILLIAM B. WETHERALL,  
CECIL F. POOLE,

By /s/ WILLIAM B. WETHERALL,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 20, 1947. [23]

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[Title of District Court and Cause.]

### DESIGNATION OF RECORD ON APPEAL

The plaintiff Philip B. Fleming hereby designates the following portion of the record to be transmitted to the Circuit Court of Appeals for the Ninth Circuit upon the appeal herein:

1. Complaint.

2. Answer of defendants Harry Chin Goon and F. W. Ruppert.
3. Findings of Fact and Conclusions of Law.
4. Judgment.
5. Notice of Appeal.
6. Statement of Points to be Relied Upon on Appeal.
7. This Designation of Record.

Dated February 19, 1947.

AUSTIN CLAPP,  
WILLIAM B. WETHERALL,  
CECIL F. POOLE,

By /s/ WILLIAM B. WETHERALL,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 20, 1947. [24]

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[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS  
OF RECORD

The undersigned defendants designate the following additional portions of the record to be contained in the record on the appeal taken by the plaintiff:

1. All docket entries.
2. This Designation.

GEORGE M. NAUS,  
WYCKOFF, GARDNER,  
PARKER & BOYLE,  
Attorneys for defendants  
Goon & Ruppert.

Receipt of a copy of the foregoing Designation is hereby acknowledged, this 21st day of February, 1947.

WILLIAM B. WETHERALL,  
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 25, 1947. [25]

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### DOCKET ENTRIES

1944

Dec. 20—Filed complt iss sum

1945

Jan. 23—Filed summons on ret-Ex

Feb. 6—Filed or. ex. time to plead

9—Filed Motion for Bill of Particulars with  
notice of hrg.

19—Ord mo for bill of parts Granted, pltff al-  
lowed 10 days to file bill

20—Filed sums ret unex

Mar. 9—Filed pltff's bill of parts

16—Filed ans of H. G. Goon & F. W. Ruppert

29—Filed ans of K. & H. Mayeda

1946

Jan. 14—Ord con Feb 25 prelim

Feb. 25—Ord con Mar 4

Mar. 4—Ord con Mar 11 to be set fur ord alias sum  
issue for deft Earl Goon

5—Filed or to issue alias sum

11—Ord trial set for Apr 16

Filed praecipe iss subpoenas

Filed praecipe iss subpoena duces tecum

12—Filed praecipe iss alias sum



1946

- Mar. 20—Filed no mo sub party plttf  
25—Filed ans of Earl Chin Goon  
Ord Paul A. Porter substd for Bowles  
Filed ord etc
- Apr. 16—Trial without jury, evid intro, con Apr 17  
17—Ord trial resumed, evid intro, con Apr 18  
18—Ord trial resumed, evid intro, con Apr 19  
19—Ord trial resumed, briefed 20-20-10 time  
to file briefs to beging when trans is  
filed
- June 13—Filed 1 vol Reporter's Transcript  
24—Filed 1 vol Reporter's Transcript
- July 11—Filed plttf's brief
- Aug. 13—Filed defts brief
- Nov. 4—Filed findings of fact & conc of law  
Filed & ent judgt for plttf \$16,586.18 &  
costs dismissed as to F. W. Ruppert  
closed  
Mailed notice [27]
- Dec. 21—Filed mo for subst of party plttf  
30—Ord mo to subst party plttf granted  
Filed ord subst party plttf

1947

- Jan. 28—Filed notice of appeal mailed notice
- Feb. 20—Filed statement of pts on appeal  
Filed designation of rec on appeal  
Filed aff't of serv by mail  
24—Filed designation of addtl pors of record
- Mar. 7—Filed ord ex time to docket [28]

District Court of the United States  
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 28 pages, numbered from 1 to 28, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Philip B. Fleming, Administrator, Office of Temporary Controls, Plaintiff, vs. Earl Chin Goon, et al., Defendants, No. 24130-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$9.90 and that the said amount has been charged against the United States.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 20th day of March, A. D. 1947.

[Seal]

C. W. CALBREATH,  
Clerk,

/s/ M. E. VAN BUREN,  
Deputy Clerk. [29]

[Endorsed]: No. 11571. United States Circuit Court of Appeals for the Ninth Circuit. Philip B. Fleming, Administrator, Office of Temporary Controls, Appellant, vs. Earl Chin Goon, Harry Chin Goon, Kamerioshim Mayeda, Harry Mayeda, Individually and doing business as Sing Hop Co., a partnership, and F. W. Ruppert, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed March 24, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.



No. 11572

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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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WILLIAM B. EDWARDS, BEN WHITE, ARCH  
ROBINSON, LEE WELLS, ARCH J. Mc-  
LAREN, ARTHUR D. BARKELEW, OSCAR  
CLAYTON, ROBERT L. CULPEPPER, ES-  
TATE OF CHARLES E. WELLS (By Lee  
Wells), ESTATE OF WILLIAM S. WELLS  
(By Harley Wells), ESTATE OF JOHN Mc-  
LAREN (By Arch J. McLaren), and the ES-  
TATE OF THEODORE BOWEN (By Wil-  
liam B. Edwards),

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division



No. 11572

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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WILLIAM B. EDWARDS, BEN WHITE, ARCH  
ROBINSON, LEE WELLS, ARCH J. Mc-  
LAREN, ARTHUR D. BARKELEW, OSCAR  
CLAYTON, ROBERT L. CULPEPPER, ES-  
TATE OF CHARLES E. WELLS (By Lee  
Wells), ESTATE OF WILLIAM S. WELLS  
(By Harley Wells), ESTATE OF JOHN Mc-  
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TATE OF THEODORE BOWEN (By Wil-  
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vs.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

WILLIAM B. EDWARDS in Pro Per, etc.,  
Seeley, Calif.

For Appellee:

JAMES M. CARTER,  
United States Attorney,

JOSEPH F. McPHERSON,  
Special Assistant to the Attorney General,  
600 U. S. Post Office  
and Court House Bldg.,  
Los Angeles 12, Calif. [1\*]

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\* Page numbering appearing at foot of page of original certified Transcript of Record.

At a stated term, to wit: the September term, A. D. 1946, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 21st day of October, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Wm. C. Mathes,  
District Judge.

No. 5611-WM Civil

BEN WHITE, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

This cause now coming before the Court; Wm. B. Edwards, appearing for the plaintiffs; Jos. F. MacPherson, Special Assistant to the Attorney General, appearing as attorney for the defendant.

Mr. Edwards asks that the Court consider the motions which he hands to the clerk, and asks permission to submit proposed motions without oral argument. It is ordered that the motions and amended complaint be filed. It is also ordered that, pursuant to stipulation of the parties, motion of the Government to dismiss, heretofore filed by counsel for the Government, stand addressed to the amended complaint. [2]

In the United States District Court  
in and for the Southern District of California  
Central Division

No. 5611 W.M. Civil

BEN WHITE, et al.

vs.

THE UNITED STATES.

MOTION TO PERMIT FILING AMENDED  
COMPLAINT

To the Honorable, the Judge of the above entitled  
Court:

The plaintiff in the above entitled case having made known to defense attorneys that he desired to amend the complaint on file, and having received notice that hearing of motion to dismiss the complaint was set for hearing October 25th before being able to file such amended complaint, plaintiff now moves to permit filing the complaint as now amended and hereto attached, it being stipulated that this complaint and supporting brief may replace the same papers now on file with no change required in the motion to dismiss or time of hearing.

/s/ WILLIAM B. EDWARDS.

It is so ordered.

-----  
Judge.

## MOTION FOR THREE JUDGE HEARING

If after reading the complaint and argument in this case the court should be inclined to deny the motion to dismiss the complaint this motion will be without reason. Motion is made for the reason (1) no court has yet taken jurisdiction in such a case unless a special Act giving the consent of Congress was first passed in each individual case, and (reason 2) making a decision for which there is yet no precedent might well be too great a burden for one judge to bear. This burden would remain in this notwithstanding Congress has now voted (July 25) to discontinue the consent requirement in other such cases, for (reason 3) by the terms of the new deal the right to discriminate against these plaintiffs would be still claimed. [3]

Therefore the issue in this case still is: (r. 4) whether the judicial department dares to function as an independent branch of the government, dispensing equal justice to all, or (r. 5) if it can only function by the consent of officials without judicial authority, yet assuming authority to veto the exercise of judicial authority by judicial officials.

The right of the judicial department to function as the Constitution designed being thus put on trial, the participation of three (or more) judges in such a trial would be a profitable assignment if it resulted in asserting such right, for (r. 6) such a decision is now long overdue and is as important to the American people as democracy itself, for

(r. 7) democracy cannot exist in a regime of discrimination.

These plaintiffs are not—of course—the only victims of discrimination in the United States. But it is the policy and principle rather than the proportion of the population victimized thereby that needs to be considered. For (r. 8) so long as discrimination is retained and asserted as a right the civil liberty of no citizen is safe, and all persons of good will—official or unofficial—will oppose the use and sanction of such a principle whether the victims be few or many.

/s/ WILLIAM B. EDWARDS. [4]

[Title of District Court and Cause.]

### AMENDED COMPLAINT

To the Honorable, the Judge of the above entitled Court:

This is a class suit brought by plaintiff Edwards on his own behalf and on behalf of the other plaintiffs under the rule permitting the joinder of plaintiffs in one action where their right of recovery arises out of the same series of transactions and there is a common question of law and fact affecting their several rights and a common relief is sought.

Jurisdiction of this court is founded on the fact that at the time these claims accrued the plaintiffs were citizens of California, residing within the district and division of this court, that each of them was deprived of his liberty, or his property or both,

by officials of the Government acting in their official capacity, but in this case acting in violation of the fifth amendment to the Constitution and other provisions of the Constitution, in disregard of the land laws of the United States, and in violation of section 5508 of the revised statutes relating to conspiracy, also known as section 19 of the criminal code, and the detriment and damage imposed upon the plaintiffs [5] by so doing, exclusive of interest and costs, exceeds three thousand dollars each.

For cause of action plaintiff alleges:

## I.

After the plaintiffs had settled upon certain lands in east side of Riverside County, had filed homesteads thereon, improved and possessed the land, and no other persons had any right or title thereto, they were arrested, imprisoned and prosecuted as criminals by Department of Justice and Department of Interior officials cooperating in a conspiracy to charge these plaintiffs with committing a criminal conspiracy to deprive others of alleged rights to settle upon and claim as homestead the same land.

## II.

The plaintiffs were induced to make such settlements and to clear, level and prepare the land for irrigation—it being desert in character and of no value without irrigation—because it was then under a reclamation withdrawal which invited those of little means to make such settlements and to im-



prove the land with the promise and contract expressed and implied by the terms of the reclamation law that if irrigation of the withdrawn area was "feasible" the Interior Department as the agent of the Government would contract for the construction of the necessary irrigation works, giving the settlers long time without interest to pay the construction costs.

### III.

Never was there a reclamation project more feasible or so easily reclaimable as this, for in an early day a certain alien speculator had constructed a ditch with its intake a few miles upstream from the valley lands, which ditch could supply river water to the one hundred thousand acres of government lands in the valley, and by the device of alleging the valley lands to be "swamp" when they were in fact "desert," this alien secured title to some forty thousand acres of the valley lands first serviceable from said ditch, but died before getting the land colonized. The plaintiffs made their settlements and entries knowing that this ditch only needed reopening and extending to supply irrigation water to all the valley lands, and the reclamation withdrawal under which their settlements were made gave them reason to believe [6] Interior Department officials would move promptly to do this.

### IV.

But Department officials made no move to provide water for these lands for no reason of feasi-

bility, but solely because a wealthy corporation called "the Land & Water Company" had acquired the tax delinquent estate lands, and the corporation also claimed the ditch which, constructed on Government land, was not tax delinquent, and to which the Government had in fact come to be the legal heir and owner. But Department officials not only did not oppose the desire of the corporation to have the exclusive right and title to this ditch which had cost the corporation nothing, they furthered and facilitated it in every possible way. First, by changing the "second form" reclamation withdrawal to a "first form" withdrawal which suspended the operation of the land laws and isolated these plaintiffs, and then by making a contest law by regulation to replace the contest law suspended by the withdrawal, both the withdrawal and the regulation made contest law being made or used for no purpose of reclaiming the land for the settlers, but solely for the purpose of reclaiming the rights of the deceived and deluded settlers to serve as "preferred" rights for corporation stooges, and later by conspiring with corporation officials to charge these plaintiffs with a criminal conspiracy as aforesaid.

## V.

As the terms proposed by the corporation to permit settlers on the government land to share in the use of the river water would have enabled the corporation to capitalize the potential value of the settler's lands charging them any price the corpo-

ration saw fit, as a last resort these plaintiffs filed suit against the corporation to require it to render service on such terms as might be fixed by law. The advantage in wealth and prestige possessed by the corporation enabled it to protract this litigation for four years during which time the plaintiffs—being unable to get irrigation water—were unable to cultivate their land, and having spent their money in the water litigation they were helpless to defend themselves when the great power of the government was then used by Department of Justice and Department of Interior officials in [7] further aid of the wealthy corporation to get these plaintiffs out of the way of the corporation and nullify the judgment in the water suit.

## VI.

The means used by Interior Department officials to effectuate this purpose was to ignore the settlements and entries of these plaintiffs and to treat the land improved and possessed by them as vacant government land subject to settlement and entry by others. The means used by Justice Department officials to effectuate the same purpose was to advise the corporation stooges to take forcible possession of the land then in the peaceable possession of these plaintiffs, it being agreed and understood that if these plaintiffs resisted this proceeding in any way they would be arrested and imprisoned on a charge of conspiracy to deprive the said stooges of alleged rights to so invade and dispossess the prior

possessors—a conspiracy of the invaders to charge a conspiracy against the persons whose premises were to be invaded.

## VII.

Then when in pursuance of this conspiracy one Bodkin, with his agents, servants and contest clients, invaded the land improved and possessed by plaintiff Edwards and was removed by court order, the result was wired to the U. S. District Attorney at Los Angeles as had been agreed and understood, and said attorney dispatched U. S. Marshals in hot haste to arrest—not just the defending possessor—but also the other plaintiffs who had not yet had occasion to defend their possessions but were expected so to do when the intended invasion of their premises should also be made. The plaintiffs were then kept incommunicado for three days before being taken to a U. S. Attorney who attempted to extort from them as the condition of release, a promise not to oppose the invasion—he called it “settlement”—of said stooges by court proceedings or otherwise, and to induce such promise he asserted that to oppose such settlement was a criminal offense the punishment for which was ten years in the penitentiary and a five thousand dollar fine. Plaintiffs would promise only to “do nothing illegal.” But the attorney reported they “had been released on their promise to cease such molestations, to dismiss any pending case in court [8] against” the stooges, and to “file no more complaints” against them.

## VIII.

This attorney then threatened to prosecute the judge of the local court and so intimidated him that he made *ex parte* and out of court statement to Bodkin that he would "take back" the judgment theretofore regularly entered, and announced that he would not try any other such case. Then followed the invasion of the Culpepper land by another stooge, the reinvasion of the Edwards land by Bodkin, service on each by Culpepper and Edwards of forcible-detainer notice, and the rearrest of these plaintiffs for opposing or expecting to oppose the forcible invasion of others, but this time the plaintiffs were kept under the duress of this criminal charge for three years instead of three days.

## IX.

At the trial besides the U. S. District Attorney and two deputies, a Field Agent of the Interior Department acted as an attorney, and a Special Assistant to the Attorney General came all the way from Washington to aid the able four against the bankrupt and helpless homesteaders charged with a conspiracy, but in fact and in truth the proceedings were in further execution of the conspiracy to punish these plaintiffs for opposing the exploiting plans of the wealthy Land & Water Company as aforesaid. And in this trial Department of Justice officials ignored the settlement and entry rights of these plaintiffs as Interior Department officials had before done, and asserted that the filing of forcible

detainer proceedings against the invaders were "overt acts" proving a criminal conspiracy of these plaintiffs. As the jury took this say-so of these high officials to be law and gospel, Culpepper and Edwards were convicted, fined, imprisoned, degraded, and "forever deprived of the right to hold any office of profit or trust under the Government." But the jury did disagree with the attorneys as to the other plaintiffs who had been arrested just to keep them from filing defensive proceedings.

Plaintiff here alleges that every attorney participating in that prosecution well knew that these plaintiffs were within their rights in defending their possessions, and the attorneys [9] were themselves the criminals and conspirators.

## X.

Convicted of a "felony," confined in a jail cell with no money to employ legal aid and never having written a complaint in his life, Edwards wrote a complaint to quiet title to the land he was imprisoned for claiming and had it filed in court. He also had set for trial the forcible detainer complaint, the filing of which was made the excuse for the re-arrest of these plaintiffs, and the duress of which proceedings had delayed trial of the detainer case for three years. The leading attorney in the criminal prosecution of these plaintiffs became the defense attorney for Bodkin in both cases. In the title case the courts finally decided the adversary had acquired no right, and as Bodkin had secured a patent for the land from the Government, the

court required him to deed the land to Edwards. In the detainer case Edwards got judgment for possession of the land and for six thousand dollars as a penalty for the unlawful invasion—none of which could be collected, yet with the same attorney defending that was the leading attorney in the criminal prosecution of these plaintiffs. never once in the three times this case was tried and appealed did he make the claim that Bodkin had a right to “settle” on the Edwards land, the sole defense being that Bodkin was legally in possession by virtue of an ejectment judgment, obtained after Edwards was arrested for filing this suit and not even permitted to know that a new ejectment action was being had—to the eternal shame of the Department of Justice. The technique here used was: “we hold ‘em, you rob ‘em.”

## XI.

Edwards having finally recovered—after ten years—the land and home of which he had been forcibly dispossessed, his Congressman promptly filed a bill to “reimburse”—not the forcibly evicted prior possessors—but the one defeated adversary for his court defeats. And notwithstanding its lack of legal or equitable basis, the Bodkin bill was promptly passed, the Claims Committee even attempting to provide a one-way jurisdiction for the court by reporting: “It is felt by the committee that the decisions of [10] the courts in this case did Bodkin an injury and injustice *for he* should recover.” Backed by this statement Bodkin’s attor-

ney argued to the Court of Claims: "The validity of this claim is not before the court. Congress has decided its validity and all the court has jurisdiction to do is to find the value of the land and render judgment." Which the court did, appraising the value of the land (made valuable by the work and expense of Edwards—not by Bodkin) at thirty thousand dollars. But in proceedings later the court denied the right of a claims committee to direct its judgment, and the judgment was vacated. Then a bill was promptly passed without objection from any source to pay that vacated judgment. Yet while giving such great consideration to the adversaries and with the facts made known, no Congressman would even file a bill for these plaintiffs.

## XII.

But when a new Congressman filed a bill for these plaintiffs there was objections galore from department officials, Congressmen and later from the President. Department officials objected particularly to that part of the bill relating to the arrest and imprisonment of these plaintiffs and asserted such use of criminal process was "necessary to enforce the jurisdiction of the Interior Department." As the subcommittee continued to advocate passage of the bill contrary to the views of the Chairman, who asserted department officials "must be presumed to have acted in good faith," department officials finally reported that if the committee would cut out all mention of the criminal proceedings department officials would not further oppose



passage of the bill. But this proved to be a false promise made with no intention of abiding by it, but just to get the bill fixed up to make the veto claims to be later made appear to be proper. Then with nothing left in the bill to indicate differently department officials represented to the President—ex parte—that the claims in the bill were not based on tort, but merely on mistakes of law in making the land decisions, and by such false representations the wanted veto was secured.

### XIII.

Noting that the veto message stated the ends of justice [11] require that the Government should recognize liability for tort, plaintiffs' Congressman and also their Senator filed bills with the respective Claims Committees identical with the copies filed with this complaint. They also filed with the Committees copies of the printed brief stating the material facts and the court decisions pertinent to this case, copies of which are also filed for the information of the court. But because Department officials oppose passage of these bills Committee Chairmen defer to their desires and have refused for years and still refuse to permit passage of these bills, while passing other bills that are as inequitable as was the Bodkin bill.

### XIV.

The several quarter sections comprising the land homesteaded by these plaintiffs are all situated contiguous and were identical in value with the Ed-

wards homestead, appraised by the Court of Claims for the purpose of reimbursing the Edwards adversary at thirty thousand dollars. Said appraisal was made at a time when attorneys for the adversary were claiming that the use of the land was not then worth anything and the adversary should not be required to pay anything on the bond filed to retain possession of the land pending appeals to the Court of Appeals and the Supreme Court. Plaintiff alleges if the use of the land had become unprofitable, that was the condition he received it after the adversary had the free use of it for ten years during which time he used it to raise cotton—a soil exhausting crop—without rotation or fertilization. But plaintiff also alleges that before being so exhausted, this land and the land the other plaintiffs were dispossessed of had a use value of ten thousand dollars per year, and this use value—belonging both in law and equity to these plaintiffs—was used by the adversaries to hire attorneys to maintain their possession, while the plaintiffs had to work by the day or otherwise to get their expenses. The result of this forcible reversal of the condition of prior possessor and adversary claimant by department officials was, that only one of the rightful owners overcame the handicap so imposed and recovered the possession forcibly taken, and this [12] plaintiff desires to prove to the court that the right of the other plaintiffs to recover the land improved and possessed by them is exactly the same as was his own right, and without the unlawful and infamous

action of department officials neither he nor they would ever have lost possession.

As a result of said interference—claiming no punitive recompense therefor and considering only the material loss imposed, conceding that any awards to the two first named plaintiffs could be called punitive as they claimed no land and any awards to them would be for their false arrest and imprisonment—plaintiff alleges that the ten last named plaintiffs have sustained material loss by being dispossessed of their land and homes, such loss amounting to more than sixty thousand dollars each. But because the defendant is the United States, although it is partly culpable for upholding such official action, discriminating against these plaintiffs and so far having barred the courts to them, the plaintiffs are willing to scale down their loss. But they can not scale it down in good conscience to less than the United States so freely gave to the adversary that this court, the Court of Appeals and the Supreme Court all said had no right, yet had been invested by United States officials for ten years with a possession that was then worth much more than thirty thousand dollars.

Wherefore, plaintiff prays: that the court will hear this case, and on proof of the facts alleged will enter judgment for the ten last named plaintiffs for the material loss imposed upon them but for not more than thirty thousand dollars each, and for costs.

/s/ WILLIAM B. EDWARDS.

State of California,  
County of San Bernardino—ss.

William B. Edwards, being sworn, on his oath says: that he has read the foregoing complaint and knows the contents thereof, and that every material statement therein is true.

Subscribed and sworn to before me this 18th day of October, 1946.

[Seal]      /s/ E. C. GRIDLEY,

Notary Public in and for the County of San Bernardino, State of California.

My commission expires November 26, 1946.

[Endorsed]: Filed Oct. 21, 1946. [13]

In the District Court of the United States in and  
for the Southern District of California, South-  
ern Division

No. 724—SD

BEN WHITE, WILLIAM B. EDWARDS, et al.,  
Plaintiffs,

vs.

UNITED STATES OF AMERICA,  
Defendant.

MOTION TO DISMISS AMENDED COM-  
PLAINT and POINTS AND AUTHORI-  
TIES IN SUPPORT THEREOF

Comes now the defendant, United States of Amer-  
ica, by Eugene D. Williams, Special Assistant to  
the Attorney General, Lands Division, Department  
of Justice, acting pursuant to the authority and by  
direction of the Attorney General, and moves the  
court as follows:

I.

To dismiss the action because the Amended Com-  
plaint fails to state a claim against the defendant  
upon which relief can be granted.

II.

To dismiss the action because the Amended Com-  
plaint does not show that the defendant has con-  
sented to be sued.

## III.

To dismiss the action because the alleged cause of action, if any, [14] set forth in the Amended Complaint is barred by the Statute of Limitations.

UNITED STATES OF AMERICA

By EUGENE D. WILLIAMS,

Special Assistant to the Attorney General.

JOSEPH F. McPHERSON,

Special Assistant to the Attorney General.

Attorneys for Defendant.

By /s/ EUGENE D. WILLIAMS.

[Endorsed]: Filed July 23, 1946. [15]

At a stated term, to wit: The September Term, A. D. 1946, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 28th day of October, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Wm. C. Mathes, District Judge.

No. 5611—WM Civil

BEN WHITE, WM. B. EDWARDS, et al.,  
Plaintiffs,

vs.

UNITED STATES OF AMERICA,  
Defendant.

This cause coming on for hearing motion of the defendant to dismiss the action and the amended complaint; Joseph F. McPherson, Assistant U. S. Attorney, appearing as counsel for the Government; Wm. B. Edwards being present in behalf of the plaintiffs:

Mr. Edwards replies to question of the Court. Attorney McPherson presents the motions. The Court asks Mr. Edwards if he wants the advice of counsel, and A. L. Wirin, Esq., being present in court, offers to assist Mr. Edwards and the said plaintiff accepts the offer.

It is ordered that the cause be, and it hereby is, continued to November 18, 1946, at 10 A.M., for bearing motion. [16]

---

[Letterhead of Wirin and Okrand]

November 14, 1946

W. B. Edwards,  
c/o Gateway Hotel,  
555 Third Street,  
San Bernardino, California.

Dear Mr. Edwards:

I am in receipt of your letter of November 10, relative to your case, and have also just spoken over the telephone with Mr. McPherson, the Assistant United States Attorney handling the matter.

Mr. Wirin, unfortunately has been called to the east and will be gone two or three weeks. I have been unable myself to look thoroughly into your case and so am not in a position to advise you as to whether there is something that can be done legally in your case and as to whether our office can handle it.

Mr. McPherson told me that I could tell you that if you desired more time in which to see whether you shall be able to make some arrangements with us or to see if you can get other professional assistance, he would have no objection to having the matter continued over again.



Although as yet we are not in the case, if you will accept this bit of advice, my suggestion is that you do ask for the matter to be put over to a future date and I feel sure if you communicate with Mr. McPherson\* by telephone immediately, that it will save your coming to Los Angeles on Monday.

Sincerely yours,

/s/ FRED OKRAND.

FO:ms

\* You can reach Mr. McPherson by calling Madison 7411, Extension 221.

[Endorsed]: Filed Nov. 25, 1946. [17]

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In the United States District Court in and for the  
Southern District of California, Central Division

No. 5611 W.M. Civil

BEN WHITE, et al.,

vs.

THE UNITED STATES.

### MOTION TO CONTINUE HEARING

To the Honorable, the Judge of the above entitled court.

The plaintiff in the above entitled case, continued till Nov. 18, finding it will be impossible to be present at that time, moves to further continue said hearing another week, or until Nov. 25, at which

time plaintiff hopes he can appear either in personam or by attorney.

Copy mailed to defense attorney, Joseph F. McPherson, at 807 Federal Bldg.

/s/ WILLIAM B. EDWARDS,  
Co-plaintiff.

It is so ordered November 25, 1946, at 10 A.M.

Date: November 15, 1946.

/s/ WM. C. MATHES,  
Judge.

[Endorsed]: Filed Nov. 15, 1946. [18]

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San Bernardino, Cal., Dec. 13, 1946.

Case of Ben White et al, v the United States No.  
5611 W.M. Civil.

To the Honorable, the Judge of the Court, to the kindly Clerk, Mr. Somers, to the able Assistant Attorney General, Joseph F. McPherson, and to attorneys Wirin and Okrand, Greeting.

In the matter of the much delayed dismissal of the motion to dismiss the complaint in this case now set for Dec. 16, the active plaintiff therein is sorry to say he will not be able to appear at that date, and not having heard from the attorney kindly suggested by the court, he hopes his motion to dismiss the complaint without prejudice need not be further delayed.

But please be advised that this plaintiff—health and high water permitting—will certainly appear at the next motion day to file a new complaint and to get a “show cause” order signed by the court to be served on the judiciary committee of Congress by U. S. Marshalls with the new complaint. So your humble servant desire to have a time set when others will not be waiting to be heard, and that will not require him to start from here before day light, as an early hearing would require, for in his frail condition such early traveling tends to shorten his life, and if you all will lend to the next hearing he will explain that his desire to remain here a while longer is not just a selfish desire, but concerns many others.

/s/ WILLIAM B. EDWARDS.

Gateway Hotel.

555 3rd St. [19]

At a stated term, to wit: The September Term, A.D. 1946, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 16th day of December, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Wm. C. Mathes, District Judge.

No. 5611—WM Civil

BEN WHITE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

This cause coming on for hearing motion of the defendant to dismiss the action; Joseph F. McPherson, Assistant U. S. Attorney, appearing as counsel for the Government, it is ordered that the cause is hereby continued to 2 P.M. for the said hearing.

At 2 P.M. court reconvenes herein and counsel for the Government being present as before, it is ordered that the cause as to the said motion be submitted. [20]

[Title of District Court and Cause.]

ORDER DISMISSING ACTION FOR LACK OF  
JURISDICTION

This cause having heretofore come before the Court for hearing on motion of defendant for an order dismissing the action, and the motion having been submitted for decision, and it appearing to the Court that the United States of America has not consented to be sued upon any cause of action asserted in the original complaint or the amended complaint herein;

It Is Ordered that this action be and it is hereby dismissed for lack of jurisdiction over the person of the defendant; and

It Is Further Ordered that this dismissal shall not operate as an adjudication upon the merits; and

It Is Further Ordered that the Clerk this day forward copies of this order by United States mail to the attorneys for the parties appearing in this cause.

December 17, 1946.

/s/ WM. C. MATHES,

United States District Judge.

Judgment entered Dec. 17, 1946.

Docketed Dec. 17, 1946, 10 Book 41, Page 49.

EDMUND L. SMITH,

Clerk.

By /s/ LOUIS J. SOMERS,

Deputy.

[Endorsed]: Filed Dec. 17, 1946. [21]

United States District Court, Southern District of  
California, Central Division

NOTICE OF APPEAL

To Edmund L. Smith, Clerk, to Louis J. Somers,  
Deputy, to James M. Carter, United States At-  
torney and/or Joseph F. McPherson, Special  
Assistant to the Attorney General.

Gentlemen:

In re Ben White et al v the United States, 5611,  
WM Civil, dismissed Dec. 17, 1946, for want of  
jurisdiction, please take notice that the plaintiffs  
therein hereby appeals said decision to the United  
States Court of Appeals for the Ninth Circuit, and  
desires all papers filed in this case to be transferred  
to said Court of Appeals.

Witness my hand and seal this 18th day of Feb-  
ruary, 1947.

(Copy mailed to defense attorneys.)

/s/ WILLIAM B. EDWARDS.

(And excuse me for getting ahead of the hounds.  
This appeal was intended to be taken immediately.)

[Endorsed]: Filed Feb. 25, 1947. [22]

In the United States District Court, Southern  
District of California, Central Division

PETITION FOR APPEAL

To Edmund L. Smith, Clerk; Louis J. Somers, Deputy, Federal Bldg., Los Angeles, and to James M. Carter, U. S. Atty.; Joseph F. McPherson, Special Asst. to the Attorney General, D.J.

Gentlemen:

In re Ben White et al v the United States, 5611 WM Civil, please take notice that the acting plaintiff therein files this petition for appeal to the Ninth Circuit Court of Appeals from the judgment of the District Court dated Dec. 17, 1946, and desires the record on appeal to show that the following errors are claimed to have been made in making said judgment, to wit:

(1) Error in not dismissing the former petition on motion of the acting plaintiff without prejudice to filing a new petition to bring the case within the new "tort" law passed Aug. 2, 1946, and—

(2) Error in continuing said motion from time to time to require the acting plaintiff to make a deal with a certain attorney. Also:

(3) Error in finally dismissing the former petition for the stated reason of "no jurisdiction" when the acting plaintiff did not and could not make a deal with said certain attorney.

Whether or not the court had jurisdiction under the petition dismissed is a "moot" question that need not now be considered. The question to be considered on appeal is, would the court have had jurisdiction under the present petition if the former petition had been dismissed without prejudice as moved by the acting plaintiff, instead of being dismissed with prejudice. [23]

Therefore only the present petition (No. 6177—O'C.) need be in the record for appeal. But the record should also contain the date when this case was first filed, the date when the motion of the acting plaintiff to dismiss without prejudice was first made orally, the written motion to dismiss later made, and the subsequent judgment of the court, with this petition and affidavit appended.

### AFFIDAVIT

William B. Edwards, being sworn, says: that he is the acting plaintiff in the above entitled case, is eighty-five years of age and his life expectancy is practically nill, his present means is derived merely from a pension which is insufficient to pay for room and board under the present high cost of living. He has therefore been obliged to find situations in rural and distant places where he could partly pay for room and board by doing chores on a farm. By so doing he has so far been able to save enough from his pension to pay the court costs, travel and hotel bills incurred in this case, but he has not been able to pay any attorney fees or retainers, and will not



be able to pay the cost of this appeal if the record must be printed, or more than the necessary costs incurred.

He has included his former neighbors in this case voluntarily, but he can not ask them for expense money as their past experience (with attorneys) has caused them to believe and say that it is just a waste of time and money to try this case. He has no heirs, and can not expect any benefit from this case personally, whatever the result, but the other plaintiffs should benefit, and the question of "equal justice to all" here involved, is vitally important to the Government and the people, and especially to the judicial department. [24]

Therefore the acting plaintiff petitions the Ninth Circuit Court of Appeals to hear this appeal with as little cost to this plaintiff as possible, thanking that court profoundly for having so sustained the lay pleadings of this plaintiff on a former occasion, (*Edwards v Bodkin*, 249 Fed. 5620) when every attorney tried—then and since—did nothing more for these plaintiffs than to collect unearned fees.

/s/ WILLIAM B. EDWARDS.

State of California,  
County of Imperial—ss.

William B. Edwards, being sworn, says: That he has read the foregoing statement and knows the contents thereof, and that every statement made therein is true.

/s/ WILLIAM B. EDWARDS.

Subscribed and sworn to before me this 4th day of March, 1947.

[Seal]      /s/ D. S. DAWSON,  
Notary Public in and for the County of Imperial,  
State of California.

[Endorsed]: Filed March 6, 1947. [25]

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 25, inclusive, contain full, true and correct copies of Minute Order Entered October 21, 1946; Motion to Permit Filing Amended Complaint and Motion for Three Judge Hearing; Amended Complaint; Motion to Dismiss Amended Complaint; Minute Order Entered October 28, 1946; Letter dated November 14, 1946, to W. B. Edwards from Wirin and Okrand; Motion

to Continue Hearing with Order Thereon; Letter dated December 13, 1946, to the Honorable, The Judge of the Court, etc., from William B. Edwards; Minute Order Entered December 16, 1946; Order Dismissing Action for Lack of Jurisdiction; Notice of Appeal and Petition for Appeal and Affidavit which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$6.80 which sum has been paid to me by appellant William B. Edwards.

Witness my hand and the seal of said District Court this 20th day of March, A.D. 1947.

[Seal]

EDMUND L. SMITH,  
Clerk.

By /s/ THEODORE HOCKE,  
Chief Deputy Clerk.

[Endorsed]: No. 11572. United States Circuit Court of Appeals for the Ninth Circuit. William B. Edwards, Ben White, Arch Robinson, Lee Wells, Arch J. McLaren, Arthur D. Barkelew, Oscar Clayton, Robert L. Culpepper, Estate of Charles E. Wells (By Lee Wells), Estate of William S. Wells (by Harley Wells), Estate of John McLaren (By Arch J. McLaren), and the Estate of Theodore Bowen (by William B. Edwards), Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed March 27, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

No. 11572

IN THE  
United States Circuit Court of Appeals  
For The Ninth Circuit

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WILLIAM B. EDWARDS, BEN WHITE,  
ARCH ROBINSON, LEE WELLS, ARCH J.  
MCLAREN, ARTHUR D. BARKELEW, OS-  
CAR CLAYTON, ROBERT L. CULPEPPER,  
ESTATE OF CHARLES E. WELLS (by Lee  
Wells), ESTATE OF WILLIAM S. WELLS  
(by Harley Wells), ESTATE OF JOHN  
MCLAREN (by Arch J. McLaren), and  
the ESTATE OF THEODORE BOWEN (by  
William B. Edwards),

*Appellants,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

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Appellant's Petition for Rehearing

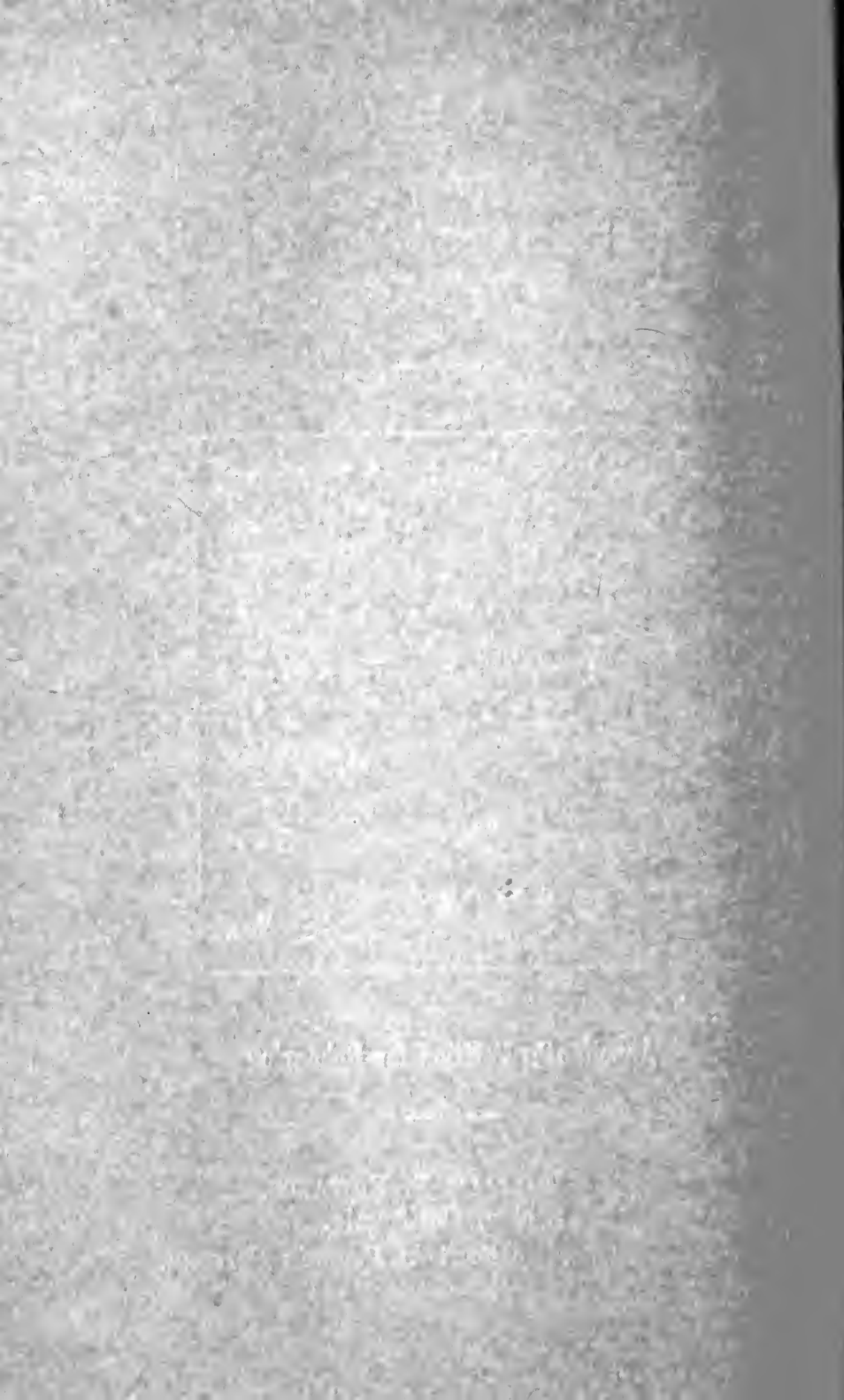
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WILLIAM B. EDWARDS,  
Seeley, California,  
*Appellant in Propria Persona.*

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PAUL P. O'BRIEN



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IN THE  
**United States Circuit Court of Appeals**  
**For The Ninth Circuit**

WILLIAM B. EDWARDS, BEN WHITE,  
ARCH ROBINSON, LEE WELLS, ARCH J.  
MCLAREN, ARTHUR D. BARKELEW, OS-  
CAR CLAYTON, ROBERT L. CULPEPPER,  
ESTATE OF CHARLES E. WELLS (by Lee  
Wells), ESTATE OF WILLIAM S. WELLS  
(by Harley Wells), ESTATE OF JOHN  
MCLAREN (by Arch J. McLaren), and  
the ESTATE OF THEODORE BOWEN (by  
William B. Edwards),  
*'suppelledv*

vs.

UNITED STATES OF AMERICA,  
*Appellee.*

APPELLANT'S PETITION FOR  
REHEARING

---

*To the Honorable Judges of the  
above entitled Court:*

The Appellants in the above entitled case  
petition the court to grant a rehearing of  
the appeal on which opinion was rendered  
August 4, for the reason (1) the opinion  
makes known that items vitally important

to the appeal and which were requested to be included in the transcript, were not included, and it is evident if they had been included the opinion rendered would have been different. And (2) rehearing should be granted for the further reason that the claims of the Appellants are founded on the fifth amendment to the Constitution which both Congressmen and judges of courts are sworn to uphold, and no specific law of Congress need be passed to give the court jurisdiction.

Concerning item (1) the opinion states: "Complaint is made by Appellant of the failure of the trial court to dismiss the complaint so that jurisdiction under the Federal Tort Claims Act could be invoked. We find no record of any such request being made to the trial court. In any event such permission could not have assisted Appellants. Said Act permits recovery only upon claims accruing on and after January 1, 1945."

So said defense attorneys. But in his reply brief Appellant quoted from the debates in passing that Act, where it was stated that claims accruing BEFORE that "on and after" date could be validated by the judiciary committee, and that no claims would be barred. The reply brief made known much other information concerning this and other restrictions plead by defense attorneys, with

page reference to the Congressional Record where it could be checked, which information does not appear to have been read by the opinion writer, the positive assertions of defense attorneys being accepted without question.

The court should bear in mind that the scandalous conduct of department attorneys in this case is the basis of this action, and such attorneys—whether or not participants in that scandal—have ever since evidenced a determination to keep that scandal covered up. It was they that ganged up to the President—*ex parte*—and by false representations, secured the veto of a bill that would have settled this case years ago. (See pages 16-20 in brief entitled: “In the Court of Sovereign Pleas.”) And they have ever since taken care that no other bill concerning this case got past the committee chairmen.

Now let’s see if there is record evidence that motion to dismiss the complaint without prejudice was made to the trial court, and if in any event such dismissal could have assisted Appellants.

The first request to so dismiss was made orally and does not appear to have been recorded. But on page 24 of the transcript Appellant is recorded as writing from San Bernardino that: “In the matter of the much

delayed motion to dismiss the complaint in this case, now set for Dec. 16, the Acting Plaintiff is sorry to say he will not be able to appear at that date, \* \* \* and he hopes his motion to dismiss the complaint without prejudice need not be further delayed.

“But please be advised that this plaintiff—health and high water permitting—will certainly appear at the next motion day to file a new complaint, and to get a ‘show cause’ order signed by the court, to be served on the (Chairman of) the judiciary committee of Congress by U. S. Marshals with the new complaint.”

Here is record evidence of request to dismiss the complaint without prejudice and the reason for it. But the opinion asserts there could be no such reason. So let’s explore that.

In the petition for appeal (page 30 of transcript) Appellant is quoted as writing to the clerk: “Whether or not the court had jurisdiction under the complaint dismissed is now a ‘moot’ question that need not be considered. The question to be considered on appeal is, would the court have had jurisdiction under the new petition, (called a petition because copies were intended to be served on committees of Congress) if the former complaint had been dismissed without prejudice instead of with prejudice.”

And the next paragraph in the transcript contained request to include the new (petition) in the record, which it is seen the clerk did not. Therefore the prayer only of that petition will be here quoted:

WHEREFORE the plaintiffs pray that the court will hear this case, and will determine if what department officials did to these plaintiffs was done in good faith law enforcement, or for the partisan purpose of securing for adversaries and by criminal process, a possession and an advantage they could not secure by civil and due process. And that the court will determine the detriment and damage imposed upon the plaintiffs by such official action if no lawful reason is found therefor, first requesting the judiciary committee of Congress to show cause if any there be why judgment should not be made in this case, and making known that if no judicial reason for not so doing is made known to the court within 30 days after service of this notice, the court will assume there is no such reason, and will enter judgment according to the facts found and determined.

Such was the prayer of the new petition. No judgment was proposed to be made until and unless the committee of Congress now passing on the "residue" claims for the Fed-

eral Tort Claims Act, being advised of the material facts, found no judicial reason for not so doing. If any change could make this prayer more acceptable to the court, such change would be made, but the implication of the opinion is that no possible change could assist the Appellants.

This may be on the assumption that if Appellant's district Congressman—who is and alway was allied with the Appellant's enemies—will not lift a finger for the Appellants, the courts will not lift a finger for them either, and the long continued discrimination against them has become a judicial as well as a political matter.

In this event the only alternative left this plaintiff to get justice for his victimized former neighbors is to defeat the district Congressman at the next election. It would not be easy to make such a campaign at 86, but he would have help. Then after the election and before he could take his seat, other Congressmen—prompted by department attorneys so to do—would start the chorus: You were convicted of a conspiracy and forever deprived of the right to hold any office of profit or trust under the Government.

This would be very welcome, for at long last the under cover work of department attorneys would be brought out in the open,

every paper in the land would print it, and the court of Public Opinion would take jurisdiction.

Concerning item (2) as a reason for rehearing, it is sad to say that although both Congressmen and judges of courts are sworn to uphold the Constitution—which of course includes the rights of citizens under the Constitution—both Congress and the courts have come to ignore such rights of citizens except as some law of Congress would provide the specific consent of Congress in each individual case, in direct disregard of constitutional provisions, and in disregard also of the legal fact stated by the Supreme Court in *Hurtado vs. California*, (110 U. S. 516-535) quoted on page 16 of opening brief, that “law *must not be* a special rule for a particular person or a particular case,” which is just what the “consent of Congress” is and all it is concerning court jurisdiction.

So it may be a waste of time to argue to the court that the Constitution is the supreme law of the land, and no specific law of Congress is needed to give the courts jurisdiction when citizens are deprived of their liberty and their property without due process.

Defense attorneys will say there WAS due process—there was a trial. Yes. But it is

not “due process” to use criminal process to settle civil controversies, and the conspiracy of department attorneys to charge a criminal conspiracy against these Appellants was successful because the real conspirators were *not* on trial, and because they could and did use the great power of the government against these Appellants for a partisan purpose and at a time when Appellants were powerless to defend themselves. But the right of department attorneys to subject citizens to such trial for such purpose is a direct issue in this case, and Appellants are entitled to a hearing on that issue regardless of any other considerations.

Concerning the defense theory—so far accepted by the courts—that the “statute of limitations” is a bar to this action, it should be said that no statute of limitations can apply in any case where the plaintiffs are prevented by the defendant from filing suit, and this judicial theory applies with equal force to the “on and after” restrictions plead by defense attorneys to bar this case from the provisions of the “tort” law.

Never has there been a time when these Appellants were free from the non-consent of Congress to prosecute this case, and never has there been a time since proceedings to “reimburse” the Edwards adversary were



started that this Appellant has not made every possible effort to get that non-consent removed, and never has there been a proper or judicial reason for not vacating that non-consent made known, as the court should take judicial notice, the real and only reason being that the wrong doers in this case don't want that non-consent removed.

In this connection it would be well for the court to consider the judicial action of this court in the case of *Edwards vs. Bodkin*, (249 Fed. 562) where Judge Warren was the opinion writer. The first consideration of this court then appeared to be to administer justice, and when the specific letter of the law was insufficient to provide justice, the court supplied the sufficiency.

The opinion in that case held that a homestead entry (on desert land) could not be contested for abandonment where the entryman was hindered, delayed or prevented from getting water to reclaim the land. After trial and judgment in the district court, Bodkin's attorneys, (ex-department attorneys) argued all day in a rehearing in which they repeated over and over that the law cited by Judge Warren applied ONLY to desert claims, and did NOT apply to homestead claims (similar to the "on and after" restriction here plead by defense attorneys).

And they repeated that argument on appeal to this court.

But they got no chance to repeat that argument to the Supreme Court, for that court dismissed their appeal without argument on motion of your humble servant under the rule that the appeal raised no real question for the court to decide.

It was very true that the law in question specified desert claims and made no mention of homestead claims. But as a matter of justice this court then held that there could be no reason to distinguish between a homestead entry on desert land, and a desert entry, and as a matter of fact, there was much more reason for the law to apply to homestead than to desert entries. But such reasons for judicial action may be out-moded in present practice.

The opinion states that under a special Act of Congress Bodkin's heirs were awarded some \$30,000 on the theory they were damaged in that amount by reason of the invalid patent issued to Bodkin. This excuse for an inexcusable act appears to have been taken from the brief of defense attorneys. By no conceivable circumstance could Bodkin—or the heirs—be damaged by the issue of a patent. This "reimbursement" of a defeated litigant for his judicial defeats was purely an

arbitrary act which Congress had no Constitutional authority to do. Not only so, but in this case it was heaping injustice on injustice by indemnifying the loser in a long drawn out legal contest where the losing side was given the free aid of the great power of the government, while the other side was given every possible obstruction by government officials and attorneys.

The question now is, with the facts made known, will the courts uphold such partisan and unconstitutional use of government power? This court did not uphold injustice in Judge Warren's day, and we hope it will not do it in Judge Orr's day.

In the reply brief Appellant quoted the Supreme Court as long ago as 1884 in the case of *Langford vs. The United States* (110 U. S. 342) as holding on the doctrine of the immunity from suit, that: "neither in reference to the United States, or the several States, or any of its officers has the English maxim any existence in this country."

And in *Marbury vs. Madison*, (5 U. S. 157) quoted in the green backed brief filed in this case, the Supreme court said:

"The very essence of civil liberty consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of the Gov-

ernment is to afford that protection. In Great Britain the King himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of the court. The Government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve that high appellation if the laws furnish no remedy for the violation of vested rights."

Now the opinion in this case quotes other supreme court decisions in a way that would indicate that the English maxim had been made into a United States maxim, and also that U. S. officials other than judicial officials were properly exercising more sovereign and irresponsible power than the King of England ever did. But with all due respect for the Supreme Court, it should be repeated that the Constitution is the supreme law of the land, and the Constitution provided no basis for the exercise of royal and irresponsible power.

In this connection the opinion of Judge Madden in the case of *Lovett, Dodd and Watson* (quoted on page 17 of opening brief), concerning the power of Congress to control court action, etc., is pertinent to this case. Judge Madden there said:

"It may well be that under our Constitu-

tion, or under any constitution devised by a free people, that one branch of the government might, temporarily at least, subvert the government. The judges might refuse to enforce laws and convict criminals. The President might order the Army and Navy to surrender to the enemy. Congress might refuse to raise money to pay the President and the judges of the courts. But any of these imagined acts would not be taken pursuant to the Constitution, but would be acts of subversion and revolution, the acts of mere physical power, not lawful authority."

Insisting on a "sovereign" right to prejudge judicial questions for the courts, dictating that the courts must uphold the unlawful acts of certain individuals, but must not protect the constitutional rights of certain other individuals, that Bodkin and his kind for instance, must have every thing THEY want regardless of the courts, while Edwards and other adversaries of the Bodkin clan must not be permitted access to the courts—these are not imagined acts" but are routine practice under the "consent" policy of Congress, and are not "pursuant to the Constitution," but ARE the acts of "mere physical power—not lawful authority.

In this connection the "conclusion" of a committee of Congress where similar—but

much less drastic action—was taken by executive officials in another case, is pertinent to this case. In that case a Federal Home Loan bank at Long Beach was closed “without notice and without cause, for the purpose of reprisal and intimidation” as disclosed to the committee. (Cong. Rec. May 6, 1947, Page A2212)

### CONCLUSIONS OF COMMITTEE

“The action here complained of was not only a disservice to the Government, it was also a disservice to the people for the protection of whose rights and affairs our Government exists. Should the time ever come when our Government is incapable of discharging that fundamental function, it must cease to exist in the form and for the purpose for which it was founded. The same end is inevitable for any endeavor with which the Government is identified. The necessity for unquestioned rectitude of purpose and sound, just and impartial administration of government endeavor is paramount.”

Such was the conclusion of the investigating committee of Congress where no one was arrested and no property confiscated, but merely made inactive. Could that “endeavor” be less “paramount” where citizens were imprisoned and their homes and possessions freely given to others? And as the “protec-

tion of the rights and affairs of the people for which our Government exists” is the duty of the judicial branch, how can this “fundamental function” be exercised when that branch declares itself impotent by pleading “no jurisdiction.”

Under this set up it appears that “our Government (became) incapable of discharging (its) fundamental function” years ago, and has therefore “ceased to exist in the form and for the purpose for which it was formed.

However, under the prayer of the new petition the American version of the English maxim would be unruffled, and the formal consent of Congress could still function if Congress and the courts both insist on such functioning, however unAmerican it may be.

But it will take a mandate of this court to get the district court interested in this case, and it is respectfully suggested that the mandate should direct the district court to have a pretrial, to find what material facts defense attorneys will admit and what will require proof pending reply to the “show cause” order or request to the committees of Congress, as such admissions and proofs may be necessary to spur the committees to action.

Humbly and respectfully,  
WILLIAM B. EDWARDS

State of California

S.S.

County of Imperial

The co-appellant and administrator above named hereby certified that in his judgment the foregoing petition for rehearing is well founded, that it is not taken for delay, that the prayer quoted therein is correctly quoted, and that three copies of this petition will be mailed to defense attorneys at the Federal Bldg., Los Angeles, as soon as printed.

WILLIAM B. EDWARDS

Subscribed and sworn to before me this  
19th day of August, 1947.

CARROLL C. CAMPBELL  
Notary Public in and for the County  
of Imperial, State of California.

My Commission Expires May 18, 1951



No. 11,573

IN THE

United States Circuit Court of Appeals  
For the Ninth Circuit

---

ALEXANDER STEELE,

*Appellant,*

VS.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, and ALFRED J. FRITZ and ROBERT MCWILLIAMS, as Judges thereof,

*Appellees.*

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

---

LEO R. FRIEDMAN,

935 Russ Building, San Francisco 4,

*Attorney for Appellant.*

JUL 16 1947

PAUL P. O'BRIEN,

CLERK



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No. 11,573

IN THE

**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

---

ALEXANDER STEELE,

*Appellant,*

VS.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, and ALFRED J. FRITZ and ROBERT MCWILLIAMS, as Judges thereof,

*Appellees.*

**Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.**

**APPELLANT'S OPENING BRIEF.**

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This is an appeal from an order dismissing appellant's complaint for an injunction and denying the issuance of an interlocutory injunction, all to prevent the appellees from proceeding with the trial of a criminal cause, filed against appellant in said Superior Court of the State of California, on the ground that said criminal cause had been removed from the jurisdiction of said Superior Court and transferred to said District Court pursuant to the provisions of 28 U.S. C.A. 74 (Sec. 31 of the Judicial Code).

## JURISDICTIONAL STATEMENTS.

The jurisdictional matters, as required by Rule 20 of this Court are as follows:

**(1) Statutes conferring jurisdiction on the United States District Court.**

28 *U.S.C.A.*, Sec. 41, reads in part as follows:

"The district courts shall have original jurisdiction \* \* \* of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

The foregoing section has been construed in *Douglas v. Jeannette*, 319 U.S. 157, 161-2, 87 L. ed. 1324, 1328.

28 *U.S.C.A.*, Sec. 377 (Judicial Code, Sec. 262) provides:

"The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

**(2) Pleadings showing the existence of the District Court's jurisdiction.**

The complaint (R. 2 to 27) alleging that the complainant, by virtue of a provision of the Constitution of the State of California, is being denied a right



guaranteed to him by the Fourteenth Amendment. The provisions of the complaint will be summarized hereafter in a statement of the case.

**(3) The statute conferring jurisdiction on the Circuit Court of Appeals.**

28 U.S.C.A., Sec. 225 (Judicial Code, Sec. 128) provides:

“The circuit court of appeals shall have appellate jurisdiction to review by appeal final decisions—

First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title.”

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**STATEMENT OF THE CASE.**

Appellant filed in the lower Court a bill of complaint (R. 2) in equity for an injunction restraining the appellees from proceeding with the trial of a California case against appellant on the ground that jurisdiction was in the United States District Court pursuant to a removal proceeding instituted under Section 31 of the Judicial Code. (28 U.S.C.A., Sec. 74.)

The substance of the bill of complaint is as follows:

That the appellant was charged by an information filed by the District Attorney of the City and County of San Francisco, in the defendant Superior Court for the violation of the provisions of Section 337a of the Penal Code of the State of California, a statute designed to prohibit and punish the acts commonly referred to as bookmaking and pool selling. (R. 3.)

The appellant pleaded not guilty of the offense, and thereafter filed with the said Superior Court, pursuant to the provisions of Section 31 of the Judicial Code (28 U.S.C.A. 74) a petition for the removal of the cause to the United States District Court for the Northern District of California (R. 4), and thereafter, pursuant to the provisions of the said statute, filed with the clerk of the District Court, copies of the process against him in the State Court and of all the pleadings, motions and other proceedings in the said action, together with a copy of his petition for removal, all of which were duly certified as being full, true and correct by the clerk of the respondent Superior Court (R. 5), and caused the clerk of the District Court to docket the case, as numbered therein 30514 H, serving written notice of said docketing upon the District Attorney. (R. 5-6.)

Paragraph X of the bill of complaint alleges:

“That upon the filing of said petition for removal in said Superior Court by Complainant as aforesaid, said defendant Superior Court and the defendant judges, Alfred J. Fritz and Robert McWilliams, then and there lost and were divested of all jurisdiction to proceed further in said criminal prosecution against complainant; that upon the filing of said petition for removal, as aforesaid, and upon the filing of the copies of said process, pleadings, papers and proceedings in the above entitled court and the docketing of said cause in the above entitled court as aforesaid, said criminal prosecution against complainant was transferred to and is now within the sole and exclusive jurisdiction of the above entitled Court,

and said Superior Court and said defendant judges thereof then and there lost and were divested of the power, jurisdiction or authority to proceed with the trial of said criminal action in said Superior Court; that despite the matters and things as herein set forth, the defendants and each of them have threatened and continue to threaten and have intended and do intend to cause said prosecution to be brought to trial in said Superior Court and to commence the trial of said criminal prosecution in said Superior Court on January 27, 1947, and unless said defendants and each of them are restrained by this court, notwithstanding the fact that said criminal prosecution has been removed to the above entitled court and said Superior Court now has no jurisdiction of the subject matter of said action, that said defendants will now proceed with the trial of said criminal prosecution as herein stated." (R. 6-7.)

Paragraph XI sets forth, as grounds upon which the District Court has jurisdiction, that under the provisions of the federal statute above referred to, the United States District Court was vested with the sole and exclusive jurisdiction of the criminal prosecution and the State Court was divested of any jurisdiction thereof; and, moreover, by virtue of the provisions of Title 28 U.S.C.A., Section 377, the District Court was vested with the power to issue all writs necessary for the exercise of its jurisdiction, including the right to restrain and enjoin further proceedings in the State Court. (R. 8.)

The bill concludes with a prayer for process and for temporary and permanent injunctions to restrain the

State Court from taking any further steps in the said criminal prosecution. (R. 10.)

Annexed to the bill of complaint as an exhibit and incorporated in said complaint is a copy of the petition for removal of the prosecution from the State Court. (R. 11 to 27.) The purport of the petition for removal is as follows:

That an officer of the State of California, to-wit, a police officer of the City and County of San Francisco, without any warrant, writ or other process of any kind or character, and without the consent of appellant, forcibly broke into an apartment occupied by the complainant as his home and dwelling, in the City and County of San Francisco and, against the wish, will and consent of appellant, took certain particularly described papers, documents and writings, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and in violation of the right of complainant to be secure in his house, papers and effects against unreasonable search and seizure. (R. 12-13.)

The petition for removal sets up the claim that the right of the people to be secure in their houses, papers and effects against unreasonable searches and seizures is protected by the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, which is a restriction upon State action.

The exhibited petition (R. 15-16) further sets forth that after appellant had been bound over for trial by a magistrate and the information lodged against him,

he filed in the State Court a motion to set aside the information couched in the following language:

“That said defendant has been committed in violation of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States of America in that the evidence used upon a preliminary hearing of said charge and upon which evidence the court made its order holding defendant to answer had been procured by peace officers of the State of California and of the City and County of San Francisco by breaking into the home and apartment of said defendant without any lawful or other warrant of law so to do and against the will, wish and consent of said defendant and did therein, against said defendant’s wish, will and consent, take into their possession certain physical evidence consisting of books, pamphlets, papers and writings, all of which more fully appears in the transcript of the testimony taken before the committing magistrate and on file in the above cause, special reference to which transcript is hereby made and by said reference included in and made a part of this motion.”

This motion was denied by the Superior Court and thereafter appellant again appeared in the Superior Court and filed a motion set forth in full as an exhibit attached to said petition for the return of the property seized and the suppression of the evidence (R. 17 and 25) obtained by reason of the illegal search, which motion was also denied by the State Court, upon the ground that pursuant to the decisions of the Supreme Court of the State of California, the rule relating to

the use of evidence in courts of the State of California was different from that of the Federal Courts, and that in the State Courts there was no procedure whereby evidence otherwise competent could be excluded because of the manner in which the same was acquired, even though such acquisition of evidence had been in violation of defendant's right to be secure against an unreasonable search and seizure. (R. 17.)

The petition for removal further alleges that the evidence introduced against appellant at the trial in the State Court will be the evidence procured in violation of his rights to be secure against unlawful and unreasonable search and seizure and "that said evidence is the only evidence of any kind or character tending to connect petitioner in any manner with any one or more of the offenses set forth and charged in the said information, and that the use of said papers, documents and writings as evidence against petitioner and their admission in evidence against said petitioner in said trial will result in said petitioner being tried in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States." (R. 17.)

Paragraph X of the petition for removal (R. 18-21) alleges as follows:

"That at all times herein mentioned section 19 of Article I of the Constitution of the State of California did read as follows:

'Sec. 19. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches, shall not be violated; and no war-

rant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.'

That while this State constitutional provision is in words and substance identical with the provision against unlawful search and seizure as set forth in the Fourth Amendment to the Constitution of the United States, the Supreme Court of the State of California has for many years last past construed said provision in a manner contrary to the letter, spirit and intent of the unlawful search and seizure clause as set forth in the Fourth Amendment to the Constitution of the United States and has held and construed the unlawful search and seizure clause of the Constitution of the State of California and the rights of an accused person thereunder to be as follows, to-wit:

(a) That under the law of the State of California there is no proceeding existing in a criminal action whereby a defendant and accused may bring any motion or proceeding for the purpose of suppressing as evidence against said defendant and accused evidence acquired by peace officers of the State of California in violation of the constitutional provision against unlawful and unreasonable search and seizure;

(b) That even though peace officers of the State of California acquire evidence as the result of unlawful breaking and entry into the home and dwelling of a defendant or by a burglarious entry therein there is no procedure under the law of the State of California whereby property

taken by said peace officers as the result of such unlawful or burglarious entry can be excluded as evidence at the trial of the person from whom such property was taken if such evidence is otherwise competent;

(c) That though the Constitution of California prohibits unreasonable and unlawful searches and seizures and provides that no warrant therefor shall issue except upon reasonable and probable cause, there is no procedure known to the law of the State of California that will prevent a peace officer from violating said provision or that will prevent the use in evidence of property acquired by such unlawful acts of a peace officer and that the person from whom said property is taken has no redress under the law of the State of California either in any criminal prosecution brought against the owner of such property or in any other manner or action, civil or criminal, save and except a civil action to recover possession of said property from the peace officer who so unlawfully acquired the same.

That the decisions of the Supreme Court so construing the California constitutional provision in the manner aforesaid, are the following, to-wit: *People v. Mayen* (1922), 188 Cal. 237; *Parker v. Board Dental Examiners* (1932), 216 Cal. 285, 300; *Herrscher v. State Bar* (1935), 4 Cal. (2d) 399, 412; *People v. Gonzales* (1942), 20 Cal. (2d) 165; *People v. Kelley* (1943), 22 Cal. (2d) 169.

That the foregoing holdings of the Supreme Court have never been deviated from and are now the law of the State of California."



The petition for removal concludes with allegations that by reason of the decisions of the Supreme Court of the State of California appellant is being denied and cannot enforce in the judicial tribunals of that State the rights secured to him by the laws of the United States providing for the equal civil rights of citizens of the United States and is being denied and will be deprived of the equal protection of the law and of due process of law as guaranteed by the Fourteenth Amendment. (R. 21.)

Attached to the petition for removal are copies of the information filed against appellant in the Superior Court (R. 23) and of the motion for the return and suppression of the evidence so unlawfully acquired (R. 25.)

Appellees filed no answer or traverse to the complaint and thus, for all purposes of the proceedings in the district court and in this Court, **the allegations of the complaint must be taken as true.**

On January 24, 1947, the district judge issued an order to show cause why a preliminary injunction should not issue. (R. 28, 29.)

Appellees countered with a motion to dismiss the complaint. (R. 29.)

On February 13, 1947, the order to show cause and the motion to dismiss the complaint came on simultaneously for hearing (R. 31) and after argument were submitted for decision.

On February 25, 1947, the district judge made an order granting the appellees' motion to dismiss the complaint. (R. 31.)

### THE QUESTION INVOLVED.

Technically, the question involved is the sufficiency of the complaint to state a cause of action for an injunction. This question, in turn, resolves itself into the proposition of whether the removal petition, attached as an exhibit to the complaint (R. 11), stated facts sufficient to remove the criminal prosecution from the State Court to the District Court under Sec. 31 of the Judicial Code. The latter proposition finds its answer in whether the right to be secure against unreasonable search and seizure is a right protected by the Fourteenth Amendment from infringement by the States.

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#### THE CALIFORNIA LAW OF SEARCH AND SEIZURE AS CONSTRUED BY THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Article I, Section 19 of the Constitution of the State of California, reads as follows:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue, but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.”

It will be noted that the foregoing Constitutional Provision is practically in the same words as the Fourth Amendment to the Constitution of the United States. In fact, the California Supreme Court held

that the adoption of the State Constitutional Provision was for the purpose of protecting the same rights and correcting the same evils as was the adoption of the Fourth Amendment.

“It may be taken for granted that the **provisions of our own Constitution \* \* \*** against unreasonable searches and seizures, and protecting the citizen from being compelled in any criminal case to be a witness against himself, **have been adopted, in almost the precise words and for the same reason, as in the federal Constitution.** They are safeguards designed to protect the intimate sanctity of the person and the home from invasion by the state.”

*People v. Mayen*, 188 Cal. 237, 249, 205 Pac. 435.

Despite the foregoing identity of language and the expression of the California Supreme Court, the latter Court has so construed the state constitutional provision against unreasonable searches and seizures, as “to reduce it to a form of words” and to sanction, under its provisions, the most flagrant violations of personal privacy and personal security without affording in the courts of California any remedy of any kind whatsoever.

Primarily, we emphasize the proposition that in deciding whether a state statute or constitutional provision runs counter to the Federal Constitution, the question must be decided not on the wording of the statute or provision, but on the construction of such statute or provision as made by the highest court of the State. It is on the state court’s construction of

the statute that the question of its being in violation of the Constitution must be decided.

*Highland Farms Dairy v. Agnew*, 300 U. S. 608, 613; 81 L. ed. 835, 840.

*St. Louis etc. Co. v. Arkansas*, 235 U. S. 350, 362; 59 L. ed. 265, 271.

*Storaasli v. Minnesota*, 283 U. S. 57, 62; 75 L. ed. 839, 843.

*Madden v. Kentucky*, 309 U. S. 83, 87; 84 L. ed. 590, 592.

Next, we call attention to the fact that in deciding the applicability of the removal statute, Judicial Code, Sec. 31, it is immaterial whether the federal constitutional right is denied by a state statute or by a provision of the State Constitution. In this regard see

*Kentucky v. Powers*, 201 U. S. 1, 31; 50 L. ed. 633, 647.

In 1922 the California Supreme Court decided the case of *People v. Mayen*, 188 Cal. 237, 205 Pac. 435. It was a criminal prosecution in which the home of the defendant had been violated by state officers and certain documents taken. The court (p. 242) admitted that the search and seizure was unreasonable and unlawful and violated the constitutional provision. On the first day of his trial, the defendant presented a motion to the trial court for an order directing the return to him of the documents so unlawfully taken. The court denied the motion. Defendant also objected to the introduction of such documents in evidence, which objection was over-ruled. The defendant was

convicted and appealed, raising the contention that the search and seizure was in violation of the state constitutional provision and that the admission in evidence of the articles over his objection, was error. The Supreme Court first pointed out (p. 243) that a trial court would not stop the progress of a trial to determine the manner in which competent evidence was received.<sup>1</sup>

Next, the State Supreme Court pointed out (p. 248) that in the Federal Courts, the property acquired by unreasonable search and seizure was admissible in evidence unless "the aggrieved party has preserved his right to object to its use by a timely application before the trial for an order restoring to his possession the property unlawfully seized." Then, the Supreme Court paid lip service to the Constitution by stating (p. 250) "that the seizure by officers of the law of private papers and effects by unlawful and unauthorized entry and search, to be used as evidence in criminal prosecutions of the persons from whom taken, is a violation of the constitutional right to security against unreasonable searches and seizures." Then **the Court definitely held that in the criminal prosecution itself, there was no step that could be taken by the defendant for the return or suppression of such evidence even though taken in violation of the constitutional provision.** Its language in this regard (p. 251) is as follows:

"The right of one whose goods have been unlawfully seized to recover their possession, and that

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<sup>1</sup>Appellant finds no fault with this rule as it is a rule sanctioned both in the Federal and State Courts.

irrespective of its effect in depriving the state of their use in evidence, is not disputed, but the contention, which we think is maintained by the great weight of authority, is that the proceeding for such recovery is independent of the criminal proceeding in which it is sought to use such articles as evidence. Even conceding the right to demand such recovery by motion before the court in which such criminal action is pending, as is apparently the rule in the federal courts and as recognized in some of the state decisions (*People v. Kinney*, 185 N.Y. Supp. 645; *State v. Peterson*, 27 Wyo. 185 [13 A.L.R. 1284, 194 Pac. 342]), upon what theory can it be held that such proceeding is an incident of the trial, in such a sense that the ruling thereon goes up on appeal as part of the record and subject to review by the appellate court? It seems to us rather an independent proceeding to enforce a civil right in no way involved in the criminal case. The right of the defendant is not to exclude the incriminating documents from evidence, but to recover the possession of articles which were wrongfully taken from him. That right exists entirely apart from any proposed use of the property by the state or its agents.

Its determination involves the framing of separate issues of fact as to the rights of possession of the goods and the method of seizure, by whom taken, and whether or not the trespass was committed by an agent of the state.

The court having tried such issue, and, as in the case before us, denied the relief demanded, we question if under any procedure recognized in the state of California such ruling can be collaterally attacked. As well might a collateral attack upon

a judgment-roll received in evidence on a trial be maintained on appeal therefrom on the ground that it was invalid because of some extrinsic fraud in its procurement. Only matters incident to the cause of action on trial are subject to review on appeal therefrom, and for this reason it is held that an objection on the trial to the admission of evidence on the ground that it has been wrongfully seized does not lie, and cannot be reviewed on appeal, but that any rights so involved must be raised in an independent proceeding."

Thus the California Supreme Court definitely decided that there is no procedure that can be invoked in a criminal prosecution whereby a defendant can assert the rights guaranteed to him by the Federal Constitution and that the deprivation of such rights cannot be reviewed on appeal from a judgment of conviction.

Next, the California court held (pp. 252-3) that the constitutional rights of a defendant are not violated by using his private papers as evidence against him and that "it was the invasion of his premises and the taking of his goods that constituted the offense," and refused to follow in the State of California the rules set forth in *Gouled v. United States*, 255 U.S. 313, in which it was held that the right to be secure against unreasonable search and seizure included the right not to have articles taken as the result thereof used in evidence against the person from whom taken.

On page 255 of the reported case, the California Court again held that any person aggrieved by a violation of his constitutional right must be left to an independent action to protect such right and to obtain redress for its enforcement, and that the only appeal that would lie was from the order made in such independent proceeding and that such violation of constitutional rights could not be reviewed on appeal from a judgment of conviction in a criminal case in which the seized property was used as evidence.

In 1932 a portion of the question was again before the California Supreme Court in *Parker v. Board of Dental Examiners*, 216 Cal. 285, 14 Pac. (2d) 67, and it reaffirmed its holdings in the *Mayen* case, *supra*.

In 1935 the California Supreme Court decided the case of *Herrscher v. State Bar*, 4 Cal. (2d) 399, 49 Pac. (2d) 832. In the *Herrscher* case a private investigator was employed by private parties, entered Herrscher's office without authority or permission and made photostatic copies of many private papers which were used in the disbarment proceeding, which was the subject of the suit. Once again the Supreme Court reaffirmed its decision in the *Mayen* case and quotes from that case (p. 412) as follows:

“The constitution and the laws of the land are not solicitous to aid person charged with crime in their efforts to conceal or sequester evidence of their iniquity. From the necessities of the case the law countenances many devious methods of procuring evidence in criminal cases. The whole system of espionage rests largely upon deceiving



and trapping the wrongdoer into some involuntary disclosure of his crime. It dissimulates a way into his confidence; it listens at the keyhole and peers through the transom-light. It is not nice, but it is necessary in ferreting out the crimes against society which are always done in darkness and concealment."

In 1942 the case of *People v. Gonzales*, 20 Cal. (2d) 165, 124 Pac. (2d) 44, came before the State Supreme Court. In that case the facts were as follows: Gonzales and Chierotti were charged with the crime of grand theft. Chierotti lived in an apartment house in San Francisco. Two police officers without any warrant, authority or permission, entered Chierotti's apartment and took therefrom a black travelling bag and contents which subsequently were admitted in evidence against Chierotti and Gonzales at the trial. Chierotti many weeks before the commencement of the trial, filed a written motion in the criminal cause for an order directing the return to him of the case and contents and the exclusion from evidence, not only of this property but of any testimony of the officers as to the facts acquired in the course of this unlawful and unreasonable search and seizure. The trial court denied the motion. When the articles and testimony of the officers were offered in evidence at the trial, such things were admitted over the objection of defendants. The motion for the return and suppression of evidence and the objections to admission of such evidence, were based on the ground that they were all in violation of the due process clause

of the Fourteenth Amendment. Defendants were convicted and appealed and the California Supreme Court affirmed the convictions and in doing so, held as follows:

That although in the Federal Courts the introduction in court of evidence obtained by an illegal search and seizure is forbidden if a timely motion for its exclusion is made by the accused, the rule in California is that, even though such timely motion be made, the evidence is nevertheless admissible. Then the decision of the California Court states (p. 169):

“The defendant may have civil and criminal remedies against the officers for their illegal acts \* \* \* but the state is not precluded from using the evidence obtained thereby.”

Following the foregoing language, the California Court states that “California is free to interpret its own Constitution,” and then discussed the contention raised by defendants that the right to be secure from unreasonable search and seizure was protected by the Fourteenth Amendment which precluded the use of evidence so acquired. In the latter regard, the California Court, at page 170, states:

“In the determination of whether the prohibition against unreasonable searches and seizures is included within this concept, the unlawful search and seizure must be distinguished from the introduction in court of the evidence obtained as a result thereof. ‘The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures’ may be so fundamental as to make any unreason-

able search and seizure by a public officer a violation of due process of law. It does not necessarily follow, however, that the use in a court of law of evidence thus obtained is so contrary to fundamental principles of liberty and justice as to constitute a denial of due process of law. \* \* \* While the United States Supreme Court has held that the due process clause includes the guarantee of the Fifth Amendment against compulsory self-incrimination to the extent that the Amendment forbids the use of a confession obtained by coercion or torture (*Chambers v. Florida*, supra; *Brown v. Mississippi*, supra; *Lisenba v. California*, supra. See *Bram v. United States*, 168 U. S. 532 [18 S. Ct. 183, 42 L. Ed. 568]), it has done so because a confession obtained by coercion or torture is so unreliable that its use violates all concepts of fairness and justice. (*Chambers v. Florida*, supra; *Brown v. Mississippi*, supra; *Lisenba v. California*, supra; cf. *Twining v. New Jersey*, supra.) The use of evidence obtained through an illegal search and seizure, however, does not violate due process of law for it does not affect the fairness or impartiality of the trial. (*People v. Defore*, 242 N. Y. 13 [150 N. E. 585]; *People v. Mayen*, supra; *Com. v. Donnelly*, 246 Mass. 507 [141 N. E. 500]; *Johnson v. State*, 152 Ga. 271 [109 S. E. 662, 19 A. L. R. 641].) The fact that an officer acted improperly in obtaining evidence presented at the trial in no way precludes the court from rendering a fair and impartial judgment. It has long been an established rule of evidence that "the admissibility of evidence is not affected by the illegality of the means through

which the party has been enabled to obtain the evidence.”

Thus we find the state court holding that there is no remedy in the state courts given to a person accused of crime, other than a civil suit against the officers for their illegal acts, for a violation of such right.

Two of the California justices dissented from the majority opinion rendered in the *Gonzales* case and the dissenting opinion will be found beginning at page 174.

In 1943 the case of *People v. Kelley*, 22 Cal. (2d) 169, 137 Pac. (2d) 1, was decided by the California Supreme Court, and again that court reaffirmed its holdings theretofore made in the *Mayer* and *Gonzales* cases and at page 173 stated:

“In the recent case of *People v. Gonzales*, supra, the California cases involving the admissibility of evidence obtained by unlawful search and seizure were reviewed, and the court considered the question whether the use of evidence so secured was a denial of due process of law guaranteed by the Fourteenth Amendment. It was concluded that the use of evidence obtained through an illegal search and seizure does not violate due process of law because it does not affect the fairness or impartiality of the trial. The fact that an officer acted improperly in securing evidence presented against a defendant does not prevent the court from rendering a fair and impartial judgment.”

It is thus demonstrated that the California constitutional provision against unreasonable searches and seizures has been construed by the highest court of the State of California in such a manner as to bring about the following results:

1. Where a person's home has been violated by state officers and unlawful entry made and property unlawfully seized, in a criminal prosecution in which such unlawfully seized property is evidence against the owner, the law of California does not give to the accused any right, motion or procedure in such criminal case, no matter how seasonably such right is asserted, whereby he can procure a return of such property or suppress its use as evidence.

2. That even though a seasonable motion is made for the return of such property and its suppression as evidence and such motion is denied and the owner convicted, the question of the propriety of the trial court's action can not be reviewed on appeal.

3. That the only remedy given to one whose property has been seized by state officers as the result of an unlawful and unreasonable search and seizure, is a civil suit against the state officers.

4. That despite the wording of the state constitutional provision against unreasonable searches and seizures, such searches and seizures are sanctioned and condoned to the extent that state officers can violate every right of a defendant in such regard and there is no state remedy to prevent use of the evi-

dence so acquired as evidence against the accused in a criminal prosecution.

As to the latter proposition, we adopt the language used by Mr. Justice Carter in his dissenting opinion in the *Gonzales* case, *supra*:

“It cannot be seriously questioned that to permit the use of evidence obtained in violation of the constitutional provision at least to some extent infringes upon the field of liberty secured by the inhibition against unlawful searches and seizures. But it goes beyond a mere partial invasion. It in effect practically destroys the right. That is true for the reason that the value of any right varies in direct proportion to the means afforded for the protection of the right; the realization of any benefit from the right is wholly dependent upon the existence of instruments for that purpose. If it may be violated and the fruits of the violation directed against the possessor of it, the fruits of it are lost, and it is no more than a bare abstraction. \* \* \* Permitting such evidence to be used is an invitation and encouragement to law enforcing officials to violate the Constitution. It gives them free reign to act upon mere suspicion and conjecture, to the harassment of the persons offended and to the end that the sanctity of his home or depository of his papers and effects is destroyed. It is of small comfort to say that he has an action against the officers. In most instances the amount of recovery would be negligible and the process costly.”

As demonstrative of the utter destruction of the constitutional guarantee in California and the extreme

lengths to which officers of that state can go in violation of the constitutional right, we call attention to the most recent case of *People v. One Mercury Sedan*, 74 C. A. (2d) 199, 168 Pac. (2d) 443, in which case the trial court excluded the illegally acquired evidence, the District Court of Appeal reversed the trial court and the Supreme Court of California denied a hearing. The facts are sufficient to shock every person who has regard for the fundamental rights of citizens. These facts, as stated in the reported case, are as follows:

“The record discloses that on April 18, 1944, an inspector of the State Division of Narcotic Enforcement followed the Williams car for some distance. He testified that he then knew the car was being used to transport marihuana. The inspector picked up two police officers and then stopped the Williams car then being driven by Williams. Williams got out of the car. The inspector handcuffed one of the passengers and then came over to where the police officers were attempting to search Williams. As he approached, Williams, who had some brown paper in his hands, put the paper in his mouth and tried to pull away from the officers. The inspector asked Williams what he had put in his mouth and was told it was gum. The inspector tried to force Williams’ mouth open, and in doing so got his finger between Williams’ teeth. Williams bit down on the inspector’s finger, and, in the ensuing struggle, Williams succeeded in swallowing what he had in his mouth. One of the officers during the struggle succeeded in handcuffing Williams’ hands behind his back.

Williams, still handcuffed, was then put in the inspector's car and taken by the officers to the emergency hospital. He was there placed on an operating table with his hands cuffed in front of him. He was told that the doctor there present was going to pump out his stomach, and, if necessary, they would strap him to the table and use force. Williams stated that would not be necessary. A doctor thereupon forced a tube through Williams' mouth and down his throat and proceeded to pump out the contents of his stomach. Towards the end of this operation Williams began to kick his legs about and the officers then held his legs down on the table.

The substances pumped out of Williams' stomach were placed in jars by the inspector and later delivered to another inspector of the State Division of Narcotic Enforcement whose duty it was to make analyses of narcotic drugs. This chemist made an analysis of the contents of the jars and found that they contained marihuana."

The California Supreme Court, by denying a hearing, approved and sanctioned the use of evidence so obtained.

A reading of the foregoing facts may well pose the question as to what further lengths state officers can and will go, under the decisions of the Supreme Court of California, in acquiring evidence. If they can resort to the use of stomach pumps, it is not beyond the realm of probability that eventually they will be performing capital operations on persons for the purpose of procuring evidence and the persons so cut



open will have no redress under the laws of California.

It is high time that these state evils be corrected by the Federal Courts.

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#### APPELLANT'S POSITION AND CONTENTIONS AND THE LAW IN GENERAL.

At the outset, we state that appellant is not disputing the rule that a trial judge does not have to stop the trial of a criminal action to try the collateral issue of the manner in which evidence has been acquired by state officers.

Neither do we dispute the rule that where no timely objection is made to the use of evidence acquired in violation of an accused's constitutional rights, the admission of such evidence at his trial, if otherwise competent, does not necessitate a reversal of a judgment of conviction.

Appellant contends that the right to be secure against unreasonable search and seizure is protected by the Fourteenth Amendment; that where such right is violated the defendant by timely motion can have the return of the property ordered by the trial judge and its use as evidence suppressed; that where the state law denies not only such right but any procedure in its courts for the enforcement or protection of such right, such state action is a violation and denial of a right guaranteed by the Federal Constitution.

Specifically, appellant contends that the decisions of the highest court of the State of California have so construed the state constitutional provision against unreasonable searches and seizures as to destroy such right in its entirety and so as to deny to any person so injured by state action any process or procedure in that state's courts for the enforcement or protection of such right.

The denial by a state of a right guaranteed by the Federal Constitution is always a ground for action and redress by the Federal Courts and justifies the removal of a state criminal prosecution, wherein such right cannot be enforced, to a Federal District Court for trial.

The removal statute, 28 U. S. C. A. sec. 74, Criminal Code, sec. 31, reads in part as follows:

“When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States \* \* \* such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next district court to be held in the district where it is pending. Upon the filing of such petition all further pro-

ceedings in the State courts shall cease and shall not be resumed except as hereinafter provided. \* \* \* ”

The purport and extent of the foregoing provision was set forth in *Kentucky v. Powers*, 201 U. S. 1, 27, 50 L. ed. 633, 645, as follows:

“After referring to what was said in *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563, to the effect that the rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress, and that the form and manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide, the court said: ‘There is express authority to protect the rights and immunities referred to in the 14th Amendment, and to enforce observance of them by appropriate congressional legislation. And one very efficient and appropriate mode of extending such protection and securing to a party the enjoyment of the right or immunity is a law providing for the removal of his case from a state court, in which the right is denied by the state law, into a Federal court where it will be upheld. This is an ordinary mode of protecting rights and immunities conferred by the Federal Constitution and laws.’ ”

In *Hull v. Jackson County Circuit Court* (CCA-6), 138 Fed. (2d) 820, 821, it is stated:

“The removal of a criminal prosecution or a civil cause under the statute in question because of the denial of a civil right or the enforcement of such a right must arise out of the destruction

of such right by the constitution or statutory laws of the state wherein the action is pending.”

Here we have a case where a right protected by the 14th Amendment not only is denied to appellant in the California courts but, by the construction of the State Constitutional provision by the highest court of the state, is actually destroyed.

The California court has held that there is no procedure recognized in that state for the enforcement or protection of the right covered by the 14th Amendment. Where the state provides for no corrective process in its courts for the enforcement or protection of a Federal Constitutional right, then the matter is one that can be immediately corrected in the Federal Courts. (Cf. *Woods v. Nierstheimer*, 328 U. S. 211, 217, 90 L. ed. 1177, 1181; *Carter v. Illinois*, 90 L. ed. Ad. Opinions, 150, 161, decided Dec. 9, 1946.)

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**THE FOURTEENTH AMENDMENT PROTECTS FROM STATE EN-  
CROACHMENT EVERY RIGHT WHICH IS A FUNDAMENTAL  
PRINCIPLE OF LIBERTY AND JUSTICE.**

The Supreme Court of the United States has consistently and repeatedly held that any right which is a fundamental principle of liberty and justice lying at the base of our civil and political institutions, is protected by the Due Process Clause of the Fourteenth Amendment. These holdings of the Supreme Court have been made irrespective of whether such right is set forth in the first eight Amendments to

the Constitution. The fact that any such right is set forth in the Amendments constituting our Bill of Rights, adds greater force to the contention that it is such a fundamental principle of liberty and justice.<sup>2</sup>

We here cite and quote from the Federal Supreme Court decisions defining the nature and character of the rights protected by the Fourteenth Amendment.

In *Powell v. Alabama*, 287 U. S. 45, 77 L. ed. 158, certain negroes had been convicted in the State of Alabama of the crime of rape. Certiorari was granted by the Supreme Court of the United States to review the convictions **solely on the ground that the defendant Powell had not been allowed to be represented by counsel at the trial.** The contention was raised that the right to have counsel was contained in the Sixth Amendment to the Federal Constitution which did not operate upon the states and therefore did not fall within the due process clause of the Fourteenth Amendment. The court held to the contrary and in doing so announced that it was the duty of the court to decide "whether the denial of the assistance of counsel contravenes the due process clause of the

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<sup>2</sup>Appellant does not contend that because the right to be secure from unreasonable search and seizure is set forth in the Fourth Amendment that perforce this right is covered by the Fourteenth Amendment. The contention is that the right to be so secure from unreasonable search and seizure is such a fundamental right that it is protected by the Fourteenth Amendment. The fact that such right is found in the Fourth Amendment merely adds weight to the claim that it is covered by the Fourteenth Amendment. In the cases hereinafter cited, the Federal Supreme Court discusses the nature of the **right** as distinguished from the Fourth Amendment itself.

Fourteenth Amendment of the Federal Constitution.” (p. 60) and then, at page 67, stated:

“The fact that the right involved is of such a character that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions’ (Hebert v. Louisiana, 272 U. S. 312, 316, 71 L. ed. 270, 272, 48 A.L.R. 1102, 47 S. Ct. 103), is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, although it be specifically dealt with in another part of the federal Constitution. Evidently this court, in the later cases enumerated, regarded the rights there under consideration as of this fundamental character. That some such distinction must be observed is foreshadowed in *Twining v. New Jersey*, 211 U. S. 78, 99, 53 L. ed. 97, 106, 29 S. Ct. 14, where Mr. Justice Moody, speaking for the court, said that ‘ \* \* \* it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action because a denial of them would be a denial of due process of law. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 S. Ct. 581. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.’ ”<sup>3</sup>

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<sup>3</sup>All emphasis in quotations from decisions have been supplied by the writer.

In *Mooney v. Holohan*, 294 U. S. 103, 79 L. ed. 791, our State Attorney General contended that a deprivation of due process could not result from any act of a prosecuting attorney, such as the introduction of known perjured testimony. The Supreme Court held against this contention and said:

“Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. **That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions.** *Hebert v. Louisiana*, 272 U. S. 312, 316, 317, 71 L. ed. 270, 273, 47 S. Ct. 103, 48 A.L.R. 1102. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. **Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.**”

In *Brown v. Mississippi*, 297 U. S. 278, 80 L. ed. 682, three negroes were convicted of murder in the courts of the State of Mississippi. The only evidence connecting the defendants with the crime were con-

fessions obtained from the defendants by means of force and torture. The state supreme court upheld the convictions on the ground that immunity from self-incrimination was not essential to due process of law and that the admission of the confessions was mere error in the trial of the cause and not the violation of a constitutional right. The Supreme Court of the United States granted a writ of certiorari and reversed the convictions on the ground that the use of such evidence violated the due process clause of the Fourteenth Amendment.

The State of Mississippi contended that the extortion of a confession, while it might constitute self-incrimination, did not violate a Federal constitutional right. The Supreme Court disposed of this contention as follows:

“The State stresses the statement in *Twining v. New Jersey*, 211 U. S. 78, 114, 53 L. ed. 97, 112, 29 S. Ct. 14, that ‘exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution,’ and the statement in *Snyder v. Massachusetts*, 291 U. S. 97, 105, 78 L. ed. 674, 677, 54 S. Ct. 330, 90 A.L.R. 575, that ‘the privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the State’. But the question of the right of the State to withdraw the privilege against self-incrimination is not here involved. **The compulsion to which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter.**”



It will be noted that the court held the right of a State to compel self-incrimination was limited to the right of a State, by statutory sanction, to call an accused as a witness and require him to testify; **that to compel him to give evidence against himself other than in a mode sanctioned by law and justice fell within the condemnation of the Constitution.**

In the case at bar, the procuring of evidence against petitioner in a manner directly condemned by the Constitution, is the equivalent of procuring such evidence in a manner not sanctioned by law.

The Supreme Court, in *Brown v. Mississippi*, supra, after discussing the case of *Powell v. Alabama*, supra, and *Mooney v. Holohan*, supra, stated:

“And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. **The due process clause requires ‘that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions’.**”

Following which the Supreme Court reversed the convictions on the ground that defendants had been deprived of due process of law and closed their opinion with the following language:

“In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions has been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be

based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner.”

Our Federal Supreme Court has thus declared that if any personal right is of such a character that it cannot be denied without violating “those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,” such right comes within the protection of the Fourteenth Amendment.

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THE RIGHT TO BE SECURE AGAINST UNREASONABLE SEARCHES AND SEIZURES IS A FUNDAMENTAL PRINCIPLE OF LIBERTY AND JUSTICE PROTECTED BY THE FOURTEENTH AMENDMENT.

In every instance where the Supreme Court of the United States has been called upon to construe the **right** to be secure from unreasonable search and seizure, it has unequivocally held such right to be a fundamental principle of liberty and justice and as of the very essence of constitutional liberty.

The latest expression of the Supreme Court on this subject will be found in the case of *Harris v. United States*, decided May 5th, 1947, 91 L. ed. ad. opinions 1013, 1016, where it is stated:

“This Court has consistently asserted that the rights of privacy and personal security protected by the Fourth Amendment . . . are to be

regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen . . .”

We quote from a few decisions of the Supreme Court defining the high nature of the right and giving some of the history leading to its establishment.

In *Gouled v. United States*, 255 U. S. 298, 65 L. ed. 647, the Supreme Court, in discussing the Fourth and Fifth Amendments to the Federal Constitution said:

“It would not be possible to add to the emphasis with which the framers of our Constitution and this court (citing cases) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decisions cited is that **such rights are declared to be indispensable to the ‘full enjoyment of personal security, personal liberty and private property’**; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right, to trial by jury, to the writ of habeas corpus and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or ‘gradual depreciation’ of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly overzealous executive officers.”

In *Byars v. United States*, 273 U. S. 28, 33, 71 L. ed. 520, 524, it is said:

“The 4th Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right.”

In the case of *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, the court devotes many pages to the history that led up to the Fourth Amendment to the Constitution of the United States and deals at length with the decision of Lord Camden in the case of *Entick v. Carrington* wherein the holding was first made that officials could not unlawfully enter an Englishman's house and take therefrom any books, papers or effects or use them thereafter for the purpose of prosecuting the home owner. The decision is quoted from at length and Mr. Justice Bradley, speaking for the court, said that the decision of Lord Camden “was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country” and that it was regarded “as one of the permanent monuments of the British Constitution”.

The court then points out that the rules laid down by Lord Camden were in the minds of the framers of our Constitution at the time of the adoption of the Fourth Amendment, and, at page 630 of the reported

case, referring to the importance of the rights so secured said:

**“The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man’s home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden’s judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man’s own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.”**

At page 633, this court dwelt upon the evil results that would follow from giving any other interpretation to the Fourth Amendment, and in doing so said:

**“We have already noticed the intimate relation between the two Amendments. They throw great light on each other. For the ‘unreasonable searches and seizures’ condemned in the Fourth Amendment are almost always made for the pur-**

pose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself', which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment."

In the more recent case of *Go-Bart Importing Co. v. United States*, 282 U. S. 344, 75 L. ed. 374, 382, the foregoing principles were reaffirmed by the Supreme Court:

"The first clause of the 4th Amendment declares: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated.' It is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made and the papers taken. *Gouled v. United States*, 255 U. S. 298, 307, 65 L. ed. 647, 651, 41 S. Ct. 261. The second clause declares, 'and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized'. This prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of

every state in the Union. *Agnello v. United States*, 269 U. S. 20, 33, 70 L. ed. 145, 149, 51 A.L.R. 409, 46 S. Ct. 4. The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted."

"General searches have long been deemed to violate fundamental rights. It is plain that the Amendment forbids them. In *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, Mr. Justice Bradley, writing for the court, said (p. 624): 'In order to ascertain the nature of the proceedings intended by the 4th Amendment to the Constitution under the terms "unreasonable searches and seizures", it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced "the worse instrument of arbitrary power, the most destructive of English liberty, that ever was found in an English law book"; since they placed "the liberty of every man in the hands of every petty officer".' "

*Marron v. United States*, 275 U. S. 192, 195, 72 L. ed. 231, 236.

In *Weeks v. United States*, 232 U. S. 383, 391, 58 L. ed. 652, 655, it is said:

“In *Bram v. United States*, 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547, this court, in speaking by the present Chief Justice of *Boyd’s Case*, dealing with the 4th and 5th Amendments, said (544):

‘It was in that case demonstrated that both of these Amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change.’ ”

Summarized, the decisions of the court have pronounced the constitutional prohibition against unlawful search and seizure to be a right “indispensable to the ‘full enjoyment of personal security, personal liberty and private property’ ” and that it is “to be regarded as the very essence of constitutional liberty” (*Gouled v. United States, supra*); that it is an “indefeasible right of personal security, personal liberty and private property” (*Boyd v. United States, supra*); that it is a principle “of humanity and civil liberty” (*Weeks v. United States, supra*); and that a violation of such right is “obnoxious to fundamental principles of liberty” (*Go-Bart Importing Co. v. United States, supra*) and has “long been deemed to violate fundamental rights”. (*Marron v. United States, supra.*)



The foregoing clearly establishes that the right to be secure against unlawful search and seizure is brought within the purview of due process as contained in the Fourteenth Amendment.

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**THE RIGHT TO BE SECURE AGAINST UNREASONABLE SEARCHES AND SEIZURES PROHIBITS THE USE AS EVIDENCE OF THE PROPERTY OBTAINED AND KNOWLEDGE GAINED THEREBY.**

The California Supreme Court attempts to draw a distinction between the unlawful search conducted by state officers and the use as evidence of property taken or knowledge acquired as the result of such unlawful search (*People v. Gonzales*, supra).

The foregoing is directly contrary to the decisions of the Federal Supreme Court which, in every instance, have held that to acknowledge the right but to permit the use of evidence or information acquired in violation of the right is in effect to nullify the right itself.

In *Olmstead v. United States*, 277 U. S. 438, 463, 72 L. ed. 944, 950, this court said:

“But in the Weeks Case, and those which followed, this court decided with great emphasis, and established as the law for the Federal courts, that the protection of the 4th Amendment would be much impaired unless it was held that not only was the official violator of the rights under the Amendment subject to action at the suit of the injured defendant, but also that the evidence thereby obtained could not be received.”

*Silverthorne Lumber Co. v. United States*, 251 U. S. 382, 64 L. ed. 319, 24 A.L.R. 1426, was a case where an indictment had been brought against the two Silverthornes and they were arrested and detained in custody. While in custody a representative of the Federal Government, without a warrant, went to the office of the Silverthornes and took all the papers and records that were there. A motion was made for the return of these papers. The Government had made copies thereof. The court ordered the originals returned to the defendant, and new indictments were found by the grand jury based upon the evidence illegally obtained. **The court held that not only were the Silverthornes entitled to the return of their original papers but that the Government could not use any information thereby obtained either at the trial or for the purpose of procuring new indictments, and said:**

“The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession; but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act. *Weeks v. United States*, 232 U. S. 383, 58 L. ed. 652, L. R. A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1117, to be sure, had established that laying the papers directly before the grand jury was

unwarranted, but it is taken to mean only that two steps are required instead of one. **In our opinion such is not the law. It reduces the 4th Amendment to a form of words. 232 U. S. 393. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.** Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but **the knowledge gained by the government's own wrong cannot be used by it in the way proposed."**

In *Weeks v. United States*, *supra*, we find a set of facts paralleling those in the case at bar, and in dealing with the use of evidence acquired by an unlawful search and seizure the Court said:

"The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises. The accused, without awaiting his trial, made timely application to the court for an order for the return of these letters, as well as other property. This application was denied, the letters retained and put in evidence, after a further application at the beginning of the trial, both applications asserting the rights of the accused under the 4th and 5th Amendments to the Constitution. **If letters and private docu-**

ments can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

*Byars v. United States*, 273 U. S. 28, 71 L. ed. 520, 522, is a reaffirmation of the doctrine:

"Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been tolerated by this Court, nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed."

Thus, the right to be immune from an unlawful search and seizure by the state includes the right not to have used against one, as evidence in a criminal case, property or information acquired by the state while conducting such unlawful search and making such unlawful seizure.

In every instance the Supreme Court has condemned the use by a state of evidence acquired in a manner proscribed by the Constitution.

In *Chambers v. Florida*, *supra*, the Fourteenth Amendment was deemed to be violated when the state

used a confession improperly obtained. This Court's language follows:

“However, **use by a State** of an improperly obtained confession may constitute a denial of due process of law as guaranteed in the Fourteenth Amendment. Since petitioners have seasonably asserted the right under the Federal Constitution **to have their guilt or innocence of a capital crime determined without reliance upon confessions obtained by means proscribed by the due process clause of the Fourteenth Amendment**, we must determine independently whether petitioner's confessions were so obtained, by review of the facts upon which that issue necessarily turns.”

In *Mooney v. Holohan, supra*, the Court held that **the use** by a state of known perjured testimony as evidence violated the due process clause. *Brown v. Mississippi, supra*, *Lisenba v. California, infra*, and all other cases dealing with confessions extorted by force, violence or intimidation, held convictions, **based upon their use**, void as lacking due process of law.

It is **the use** by a state of evidence acquired in a manner proscribed by the Constitution that constitutes the taking of life, liberty or property without due process of law.

NO DISTINCTION EXISTS BETWEEN THE USE OF CONFESSIONS OBTAINED IN VIOLATION OF THE CONSTITUTION AND THE USE OF EVIDENCE ACQUIRED BY AN UNREASONABLE SEARCH AND SEIZURE.

The California Supreme Court acknowledges that the use by a state of a confession procured by force, violence or intimidation constitutes a denial of due process of law. That Court, however, attempts to draw a distinction between such unlawfully procured confessions and evidence acquired by an unlawful search and seizure by holding that the manner of procuring the confession has been declared by the Federal Court to be obnoxious to the Fourteenth Amendment because "a confession obtained by coercion or torture is so unreliable that its use violates all concepts of fairness and justice" while the use of evidence "obtained through an illegal search and seizure does not violate due process of law for it does not affect the fairness or impartiality of the trial." (*People v. Gonzales, supra.*)

The foregoing reasoning of the California Court is fallacious and directly contrary to the doctrine announced by the U. S. Supreme Court.

In *Lisenba v. California*, 314 U. S. 219, 86 L. ed. 166, it is expressly stated that the rule as to confessions **was not based on the fact that they may be false**. The Court's language therein is as follows (p. 236):

"The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false."

In *Marron v. United States*, 275 U. S. 192, 196, 72 L. ed. 231, 237, this Court has placed convictions obtained by means of unlawful seizures and forced confessions on identically the same footing:

“The tendency of those who execute the criminal laws of the country to obtain conviction **by means of unlawful seizures and enforced confessions** \* \* \* should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.”

As demonstrative of the fallacy of the State Court's decisions and as showing that there is no distinction, in the constitutional right involved, between enforced confessions and property obtained by unlawful seizures we present the two following hypothetical cases:

**Case 1.** A man has committed a crime. A state officer points a gun at him and under threat of shooting him to death forces him to sign a confession of guilt. There is no other evidence presented in the case except proof of the *corpus delicti* and the confession. The man is convicted.

Under the interpretation of the Fourteenth Amendment, as accepted by the state Court, the use of such confession, procured under such circumstances, is a violation of the Fourteenth Amendment and necessitates a reversal of the conviction.

**Case 2.** A man has committed a crime. A state officer at the point of a gun enters his home and under

threat of shooting him to death compels him to deliver over incriminating evidence. There is no other evidence presented in the case except proof of the *corpus delicti* and the incriminating evidence procured by the state officer under the foregoing circumstances. The man is convicted.

As the Fourteenth Amendment excludes the use of the confession in Case 1 it must equally exclude the use of the incriminating evidence in Case 2. In each instance the evidence has been procured in identically the same manner. Yet, under the interpretation of the State Court, the incriminating evidence would be admissible and could not be excluded in Case 2 although the confession in Case 1 would be inadmissible. No distinction exists between the two cases.

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**THE DENIAL OR DESTRUCTION OF THE RIGHT TO BE SECURE AGAINST UNREASONABLE SEARCH AND SEIZURE CANNOT BE JUSTIFIED ON THE GROUND THAT IT IS A LOCAL QUESTION OR MERELY INVOLVES THE REGULATION OF PROCEDURE AND EVIDENCE IN THE STATE COURTS.**

The decisions of the California Supreme Court seek to justify the use of evidence unlawfully obtained by State officers as being but a regulation of State Court procedure and rules of evidence.

While a State is free to regulate the procedure of its Court, it, nevertheless, is bound in so doing by the provisions of the Federal Constitution. Thus, in *Brown v. Mississippi*, supra, the Federal Supreme Court states:



“The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’ ”

In the late case of *Angel v. Bullington* (decided February 17, 1947), 91 L. ed. Ad. Opinions 557, 560, the inability of a State to deny a federal question under the guise of local practice is stated as follows:

“This pervasive principle of our federal law, constitutional and statutory, was thus put by Mr. Justice Holmes: ‘Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.’ *Davis v. Wechsler*, 263 US 22, 24, 68 L ed 143, 145, 44 S Ct 13.”

The right contended for herein being a Federal right guaranteed by the Federal Constitution, cannot be defeated by the State claiming a justification for the violation of such right under the guise of local practice.

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### CONCLUSION.

The right to be secure against unreasonable search and seizure is a fundamental principle of liberty and justice and as such is protected by the Fourteenth Amendment. The highest Court of the State of Cali-

fornia has so construed the State constitutional provision prohibiting unreasonable searches and seizures so as to deny this fundamental right and authorize its violation by State officers and the use of evidence so unlawfully obtained without affording any remedy and redress to the injured person in the California Courts. This is a denial of a fundamental Federal right, such denial being justified and sanctioned by the State constitutional provision as construed by the California Supreme Court.

The petition for removal sets forth every fact showing the denial and deprivation of this right and therefore states full and complete grounds for the removal of the cause from the State Court to the District Court under Section 31 of the Judicial Code. It follows that jurisdiction of the cause was vested in the District Court and that Court had the power to issue an injunction to preserve its jurisdiction. The complaint stated a cause of action and the District Court erred in granting the motion to dismiss and in refusing to issue an interlocutory injunction.

Dated, San Francisco,

July 9, 1947.

Respectfully submitted,

LEO R. FRIEDMAN,

*Attorney for Appellant.*

No. 11,573

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

---

ALEXANDER STEELE,

*Appellant,*

VS.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, and ALFRED J. FRITZ and ROBERT MCWILLIAMS, as Judges thereof,

*Appellees.*

---

BRIEF FOR APPELLEES.

---

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FILED

SEP 17 1947

PAUL F. O'BRIEN,



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No. 11,573

IN THE

**United States Circuit Court of Appeals**  
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ALEXANDER STEELE,

*Appellant,*

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, and ALFRED J. FRITZ and ROBERT MCWILLIAMS, as Judges thereof,

*Appellees.*

---

**BRIEF FOR APPELLEES.**

---

Appellant sought in the Court below to have a criminal action removed to the United States District Court for trial allegedly pursuant to the provisions of section 31 of the *Judicial Code*. (*U.S.C.A.*, Title 28, sec. 74.) The Court granted appellees' motion to dismiss from which order the appellant is prosecuting this appeal. Pending the appeal the Court below has granted an injunction staying the prosecution of the criminal action pending the appeal.

This case is but an attempt to use the federal judicial system after the manner of a demurrer, motion or other dilatory plea in order to postpone the prosecution of an affluent defendant in a criminal action pending in a State Court.

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### **STATEMENT OF THE PLEADINGS AND FACTS.**

#### **1. Jurisdiction.**

Appellant claims that his case is one to redress the deprivation of a constitutional right, i.e. "due process of law" and that the District Court has jurisdiction under Title 28 *U.S.C.A.*, section 41(15) (*Judicial Code*, sec. 23(14)) and, that the criminal action pending in the State Court is therefore removable under the provisions of Title 28 *U.S.C.A.*, section 74. (*Judicial Code*, sec. 31.)

Appellate jurisdiction depends (according to appellant) on Title 28 *U.S.C.A.*, section 225. (*Judicial Code*, sec. 128.)

#### **2. Statement of pleadings and facts.**

There was no issue of fact or trial in the Court below. A motion to dismiss was granted. All facts set out in this statement have been taken from appellant's bill of complaint and the papers attached thereto.

Appellant was informed against by the District Attorney of the City and County of San Francisco on three felony counts for violations of section 337a

of the *Penal Code* of the State of California. (R. 2, 22.) In short he was charged with being a "book-maker" and violating the gambling laws.

He entered a plea of not guilty and his case was set for trial. (R. 4.)

On August 24, 1946 he filed a petition for the removal of the criminal action to the United States District Court for trial pursuant to the provisions of Title 28 *U.S.C.A.*, section 74. (*Judicial Code*, sec. 31.) (R. 4, 11.)

Appellant complains that the State Court will, unless restrained, proceed to try him on the "bookmaking" charges (R. 7) and that in that event he will have no plain, speedy or adequate remedy at law.

Appellant attaches to his petition the papers in the criminal action which he sought to remove from which the following facts appear:

Appellant was on June 13, 1946 charged in the State of California with a violation of section 337a, *Penal Code*. (R. 23.) On July 19, 1946 he made a motion in the criminal case for the return of certain seized property and the suppression of evidence. The motion is signed by counsel and is unverified by appellant or any other person. (R. 25.) The motion was denied. (R. 17.)

The petition for removal alleges that the trial of the criminal action will proceed and that appellant will not be afforded due process of law because evidence which was allegedly illegally seized will be used

against him, all in violation of the rights guaranteed to him under the 14th Amendment to the *Constitution of the United States*. (R. 21.)

Appellees moved to dismiss the proceeding and to remand the criminal action. (R. 29.) The motion was granted on February 25, 1947. (R. 31.)

An appeal was taken by appellant on March 12, 1947. (R. 32.) On March 13, 1947, the District Court issued an order staying the prosecution of the criminal case pending this appeal.

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### ARGUMENT.

1. **THE DOCKETING OF THE PETITION FOR THE REMOVAL OF THE CAUSE TO THE UNITED STATES DISTRICT COURT DID NOT CONFER JURISDICTION ON IT.**

It is apparently the contention of appellant that by his act of carrying the papers to the Federal Court and there "docketing" them, he thereupon divested the Superior Court of all jurisdiction in the matter and conferred jurisdiction upon the Federal Court. This action is not new for the same point was commented upon in the case of *People of the State of California v. Lamson*, 80 F. (2d) 388, which held adversely to appellant, and where Mr. Friedman was counsel for complainant. The Ninth Circuit, speaking through Mr. Justice Wilbur, stated:

"Petitioner's contention that there has been an automatic removal of the cause from the state to the federal court has been long settled adversely to his contention."

Judge Wilbur continues reciting with approval from the case of *Stommel v. Timbrell*, 84 Iowa 336, where the Court stated with reference to a similar application:

“The law is that a state court does not lose jurisdiction by the filing of a petition for removal, unless the petition shows upon its face that the case is removable. ‘The state court is not required to let go its jurisdiction until a case is made which upon its face shows that the petitioner can remove as a matter of right.’ ”

And, again, Judge Wilbur, citing *Ex parte State of Alabama*, 71 Ala. 363, pointed out that that Court said:

“The jurisdiction of the State court is not ousted by a mere application for the removal of a civil cause, or of a criminal prosecution to a Federal court. It is only when the application is in proper form, conforms to the act of Congress authorizing the removal, stating facts bringing the case within the provisions of the act, that it becomes the duty of the State court to yield obedience to the paramount law, and to cease the exercise of its original jurisdiction \* \* \* ”

As indicated in *Lamson v. Superior Court*, 12 F. Supp. 812, the complaint must contain allegations of fact from which it would appear the Court is justified in granting the relief prayed for. The mere docketing of the record does not constitute an automatic removal of the cause.

In *People of the State of California v. Lamson*, 12 F. Supp. 813, at page 817, Judge St. Sure said:

“The persistent effort to pitchfork this prosecution into the federal courts must be attributed to the blind zeal of the attorneys for the accused, for it has no justification in law. The proper judicial tribunal for the trial of the accused is within the jurisdiction of the state of California, where the criminal prosecution is pending, and where it should remain until final judgment.”

It is of interest to note that Mr. Friedman acted as counsel in both the *Lamson* decisions above cited.

In *Southern Pacific Co. v. Haight*, 126 F. (2d) 900 (Ninth Circuit), this Court, quoting from *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239, 244, said at page 903:

“‘It is well settled that if, upon the face of the record, including the petition for removal, a suit does not appear to be a removable one then the state court is not bound to surrender its jurisdiction, and may proceed as if no application for removal had been made.’”

- 
2. THE INTRODUCTION OF EVIDENCE ALLEGEDLY OBTAINED THROUGH UNLAWFUL SEARCH AND SEIZURE IN THE STATE COURT DOES NOT IMPINGE UPON THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

It has long and consistently been held that the provisions of the Fourth Amendment to the *Federal Constitution* with respect to search and seizure are limita-

tions upon the Federal Courts only and do not apply to State procedure. Nor can it be read into the Fourteenth Amendment to the Federal Constitution. A most comprehensive expression of this doctrine is found in *People v. Mayen*, 188 Cal. 237, at page 241, which reads:

“All consideration of the application of the federal constitution to this case may be at once eliminated, as it is well settled that the fourth amendment to the constitution of the United States, relating to searches and seizures, only applies to the federal government and its agencies. (*Weeks v. United States*, 232 U.S. 383 (Ann. Cas. 1915C, 1177, L.R.A. 1915B, 834, 58 L.Ed. 652, 34 Sup. Ct. Rep. 341, see, also, *Rose’s U. S. Notes*); *State v. Peterson*, 27 Wyo. 185 (13 A.L.R. 1284, 194 Pac. 342); *Gindrat v. People*, 138 Ill. 103 (27 N. E. 1085).) In the *Weeks* matter it was held that even where the matter was pending in the federal court, the unlawful search and seizure having been made before the finding of the indictment, and not by an officer of that court, the provisions of the constitution could not be invoked against the evidence so procured. Consequently, the rule adopted by the United States courts is not controlling authority here and is not necessarily applicable in principle to the interpretation of the state constitution on this point.”

On page 243 the State Supreme Court continues:

“There is no rule better established or more universally recognized by the courts than that where competent evidence is produced on a trial the courts will not stop to inquire or investigate

the source from whence it comes or the means by which it was obtained.

“There is no need to elaborate this proposition. The general rule is thus stated by Greenleaf (1 Greenleaf on Evidence, sec. 254): ‘Though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice of how they were obtained, whether lawfully, or unlawfully, nor will it form an issue to determine that question;’ ”

Indeed, the rule announced in the *Mayen* case is admitted by counsel for appellant to be the rule in this State which the State Supreme Court has consistently followed.

See:

*Parker v. Board of Dental Examiners*, 216 Cal. 285, 300;

*Herrscher v. State Bar*, 4 Cal. (2d) 399, 412;

*People v. Gonzales*, 20 Cal. (2d) 165 (cert. denied by U. S. Supreme Court, 317 U. S. 657, and rehearing denied 317 U. S. 708);

*People v. Kelley*, 22 Cal. (2d) 169.

In the *Kelley* case, the last utterance, as far as we can find in this State, it is said on page 173:

“In the recent case of *People v. Gonzales*, *supra*, the California cases involving the admissibility of evidence obtained by unlawful search and seizure



were reviewed, and the court considered the question whether the use of evidence so secured was a denial of due process of law guaranteed by the Fourteenth Amendment. It was concluded that the use of evidence obtained through an illegal search and seizure does not violate due process of law because it does not affect the fairness or impartiality of the trial. The fact that an officer acted improperly in securing evidence presented against a defendant does not prevent the court from rendering a fair and impartial judgment.

“This decision is determinative of the contentions made by the appellant to the contrary, although it is not a complete answer to the problem. For in the present case, because the challenged evidence consists of the reports of telephone conversations, a broader question is presented, requiring a construction of the Federal Communications Act (*Supra*).”

That the Fourth Amendment to the *Federal Constitution* has no application to State procedure, see:

*National Safe Deposit Company v. Illinois*, 232

U. S. 58, 71;

*Ohio ex rel. Lloyd v. Dollison*, 194 U. S. 445, 447;

*U. S. v. Smith*, 23 F. Supp. 528;

*Taylor v. Hudspeth*, 113 F. (2d) 825;

*Rettich v. U. S.*, 84 F. (2d) 118.

Evidence which is obtained through unlawful search and seizure is not for that reason the less trustworthy, nor does the State Constitution contain any specific provision against the use of such evidence in the trial

of a criminal case. As indicated in *People v. Gonzales*, 20 Cal. (2d) 165, at page 169, the only recourse that the defendant may have is in civil and criminal remedies directly against the officers for their illegal acts.

It is of interest to note that Mr. Friedman was counsel in the *Gonzales* case. In the case of *People v. Gonzales*, 20 Cal. (2d) 165, Mr. Friedman, counsel in the instant case, made the same point that he makes in this case, i.e., that the use in evidence of matters obtained by an illegal search was a deprivation of due process of law and in violation of the accused's rights under the Fourth and Fourteenth Amendments to the *Constitution of the United States*. In disposing of this contention the Supreme Court of California said:

“While the United States Supreme Court has held that the due process clause includes the guarantee of the Fifth Amendment against compulsory self-incrimination to the extent that the Amendment forbids the use of a confession obtained by coercion or torture (*Chambers v. Florida*, supra; *Brown v. Mississippi*, supra; *Lisenba v. California*, supra. See *Bram v. United States*, 168 U. S. 532 [18 S. Ct. 183, 42 L. Ed. 568]), it has done so because a confession obtained by coercion or torture is so unreliable that its use violates all concepts of fairness and justice. (*Chambers v. Florida*, supra; *Brown v. Mississippi*, supra; *Lisenba v. California*, supra; cf. *Twining v. New Jersey*, supra.) The use of evidence obtained through an illegal search and seizure, however, does not violate due process of law for it does not affect the fairness or impartiality of the trial. (*People v. Defore*, 242 N. Y. 13 [150 N. E. 585];

People v. Mayen, *supra*; Com. v. Donnelly, 246 Mass. 507 [141 N. E. 500]; Johnson v. State, 152 Ga. 271 [109 S. E. 662, 19 A.L.R. 641].) The fact that an officer acted improperly in obtaining evidence presented at the trial in no way precludes the court from rendering a fair and impartial judgment. It has long been an established rule of evidence that 'the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence.' (8 Wigmore, Evidence (3rd ed.), sec. 2183, p. 5, and cases there cited.)"

*Peo. v. Gonzales*, 20 Cal. (2d) 165, 170.

Counsel then took the *Gonzales* case to the Supreme Court of the United States and presented to that Court the very point urged here. Certiorari was denied. (*Gonzales v. California*, 317 U. S. 657, 87 L. Ed. 528; 317 U. S. 708, 87 L. Ed. 564.)

Even if the criminal action was removable to the Federal Court it is difficult to see what advantage could be gained by appellant. The evidence gathered by the San Francisco police and denounced by appellant as against the rule of unreasonable searches and seizures would still be legally admissible in the trial of the case in the Federal Court, since this evidence was secured by members of the police department of the City of San Francisco in which no federal officer participated. Thus, in *Feldman v. United States*, 322 U. S. 487, at page 492:

"And so, while evidence secured through unreasonable search and seizure by federal officials is inadmissible in a federal prosecution, Weeks v.

United States, *supra*; *Gouled v. United States*, 255 U. S. 298; *Agnello v. United States*, 269 U. S. 20, incriminating documents so secured by state officials without participation by federal officials but turned over for their use are admissible in a federal prosecution. *Burdeau v. McDowell*, 256 U. S. 465. Relevant testimony is not barred from use in a criminal trial in a federal court unless wrongfully acquired by federal officials."

See also:

*Byars v. United States*, 273 U. S. 28, 33.

The fact that the rule laid down by the Supreme Court of the State of California applies to all alike, does not violate the section of the Constitution against the equal protection of the laws.

And the fact that section 19 of Article I of the *State Constitution* reads substantially as does the Fourth Amendment, and that its application has been construed by the Supreme Court of the State of California in a manner contrary to that of the Federal Courts on the Fourth Amendment to the *United States Constitution*, cannot avail appellant. The construction of the Constitution and the statutes of the State of California by the Courts of that State are binding upon the Federal Courts.

*La. v. Resweber, et al.* (Jan. 13, 1947), Vol. 67,  
No. 5, page 374, S. Ct. Rep. Adv. Ops.;

*Carter v. Illinois*, Vol. 91, No. 3, page 157, L.  
Ed. Adv. Ops.;

*Buchalter v. New York*, 319 U. S. 427.

### 3. THE ORDER OF THE UNITED STATES DISTRICT COURT DISMISSING THE COMPLAINT IS NOT APPEALABLE.

The order of the United States District Court dismissing the complaint is conclusive, from which an appeal may not be taken.

*Kloebe v. Armour & Co.*, 311 U. S. 199;

*Yankaus v. Feltenstein, et al.*, 244 U. S. 127;

*Wabash Ry. Co. v. Lindley*, 29 F. (2d) 829;

*Atchison T. & S. F. Ry. Co. v. Smith*, 47 F. (2d) 223;

*U. S. v. Fixico, et al.*, 115 F. (2d) 389;

*U. S. v. Johnson*, 116 F. (2d) 501;

*Haney v. Wilcheck*, 38 F. Supp. 345;

28 U.S.C.A., sec. 71.

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### CONCLUSION.

It is submitted that the pleadings of petitioner contain no allegations upon which to base the removal of the cause to the Federal Court; that the proper tribunal for the trial of the criminal charge is the State Court from which removal is sought and which affords appellant a complete and adequate remedy at law. In the event the State Courts find adversely to him, he may again test the matter out in the United States Supreme Court. It appears that appellant seeks by this appeal to overthrow a long line of decisions by the Federal Courts and the United States Supreme Court holding the Fourth Amendment to the *Federal Constitution* has no application to State procedure. Mr. Friedman, counsel for appellant, carried

the point to the United States Supreme Court by certiorari in *People v. Gonzales*, supra, which was there twice denied.

The appeal should be dismissed, the injunction declared void, or dissolved, and the cause remanded to the State Court for trial, where it belongs.

Dated, San Francisco,  
September 16, 1947.

Respectfully submitted,

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Attorney General of the State of California,

CLARENCE A. LINN,

Deputy Attorney General of the State of California,

*Attorneys for Appellees.*

No. 11,573

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Upon Appeal from the District Court of the United States for the  
Northern District of California, Southern Division.

APPELLANT'S REPLY BRIEF.

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PAUL P. O'BRIEN,  
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WILLIAMS, as Judges thereof,

*Appellees.*

Upon Appeal from the District Court of the United States for the  
Northern District of California, Southern Division.

**APPELLANT'S REPLY BRIEF.**

---

It is apparent that the appellees have wholly misconceived the nature of the proceeding in the District Court, the points raised by appellant herein and the nature of the **right** which appellant claims is protected by the Fourteenth Amendment and which is denied by the laws of California, as such laws have been construed by the highest Court of that State.

It is appellant's contention that the **right** to be secure from unreasonable searches and seizures is

such a fundamental principle of liberty and justice that it falls within the protection of the Fourteenth Amendment, irrespective of the protection of such right from federal infringement by the provisions of the Fourth Amendment.

It is appellant's further contention that the decisions of the Supreme Court of California not only have destroyed and nullified this great right but have destroyed and denied the existence of any process, procedure or remedy in the state courts for the enforcement and protection of such right.

Where the State of California has denied all remedies for the enforcement of a constitutional right, the federal courts are open for the correction of such wrong and the enforcement of such right.

“Furthermore, it cannot be doubted that if the State of Illinois should at all times deny all remedies to individuals imprisoned within the state in violation of the Constitution of the United States, the federal courts would be available to provide a remedy to correct such errors. *Ex parte Hawk*, 321 U.S. 114, 88 L. ed. 572, 64 S. Ct. 448.”

*Woods v. Nierstheimer*, 328 U.S. 211, 217, 90 L. ed. 1177, 1181.

See also

*Carter v. Illinois*, ..... U.S. ...., 91 L. ed. Ad. Op. 157, 161.<sup>1</sup>

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<sup>1</sup>Erroneously cited on page 30 of Appellant's Opening Brief as 90 L.ed. Advance Opinions.

Appellees state the proposition as if this were an appeal from an order remanding the criminal prosecution back to the state Court. On page 4 of their brief, appellees state that they moved to dismiss the proceeding and to remand the criminal action and that the motion was granted on February 25, 1947. This is incorrect. On February 25, 1947 the District Court made an order (R. 31) dismissing the complaint filed in equity for an injunction. No order was ever made remanding the criminal cause to the state Court.<sup>2</sup>

This is an appeal from an independent suit in equity brought to enjoin the state courts from usurping the jurisdiction of the Federal District Court. The suit is predicated on the ground that under the removal statute (28 U.S.C.A. 74), a criminal action originally started in the state Court had been removed to the District Court. The only question involved is whether the complaint for an injunction states a cause of action. This in turn depends on whether the removal petition, attached as an exhibit to the complaint, stated facts sufficient to remove the criminal prosecution into the District Court. The entire matter resolves itself into the query of whether the right to be secure against unreasonable search and seizure is a right protected by the Fourteenth Amendment

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<sup>2</sup>Since the docketing of this appeal in this Court, appellees moved the District Court for an order dissolving the injunction issued to hold matters in *status quo* and to remand the criminal cause back to the State Court. The District Judge denied each of these motions on the ground that appellant had raised a grave constitutional question and was entitled to have the same determined by this Court.

from infringement by the states. If such right is protected by the Fourteenth Amendment, then the complaint stated a cause of action and, if the complaint did state a cause of action, then the criminal prosecution was removed from the state Court to the District Court.

Appellees have not briefed this question and rely upon the decisions of the Supreme Court of the State of California. It is these very decisions which deny the existence of the right to be secure from unreasonable searches and seizures and which hold that there is no remedy in the state Courts for the protection or enforcement of such right.

Where a petition for removal of a cause from the state Court to the federal Court has been properly filed in the state Court and the cause docketed in the federal Court, such federal Court has the right and power to protect its own jurisdiction by injunctive relief and such injunctive relief may be granted in an ancillary proceeding filed in the federal Court praying for such injunction. In this regard see the following cases:

*Atchison T. & S. F. Ry. Co. v. Smith*  
(C.C.A.-9), 47 Fed. (2d) 223;

*People v. Lamson*, 12 Fed. Supp. 812.

**THE DOCKETING OF THE REMOVAL PETITION CONFERRED  
JURISDICTION ON THE DISTRICT COURT AND REMOVED  
THE CRIMINAL PROSECUTION INTO THAT COURT.**

Appellees contend that the filing of the removal petition in the state court and the subsequent docketing of the same, together with all other papers in the criminal cause, in the District Court of the United States did not operate to transfer the criminal cause to the District Court or vest that court with jurisdiction thereof. In support of their contention, appellees cite the following cases:

*People v. Lamson*, 80 Fed. (2d) 388;

*Ex parte State of Alabama*, 71 Ala. 363;

*Southern Pacific Co. v. Haight*, 126 F. (2d) 900.

We have no fault to find with the holdings in the foregoing cases. In substance they merely hold that the mere filing of a paper does not transfer jurisdiction from one court to another; that the state court has the right to examine the petition for removal and to determine whether or not it states facts sufficient for the removal of the cause and, if such facts are not stated, to proceed with the trial of the criminal action.

This is a situation that is not presented to this Court. We are not here concerned with whether the state Court is or is not going to proceed with the criminal trial for the reason, among others, that they have been enjoined and restrained from so proceeding. The sole question presented is whether the cause as a matter of law and fact has been removed to the

District Court. The removal statute (28 U.S.C.A. 74) provides that "upon the filing of such petition, all further proceedings in the state Courts shall cease", and that upon the docketing of the case in the District Court "the said Court shall then have jurisdiction therein". It should be manifest that something more was contemplated by the statute than the mere useless acts of filing a removal petition and docketing of the cause, leaving the state Court to proceed at its pleasure. **The state Court must be divested of all jurisdiction if the removal petition states facts sufficient to bring the cause within the purview of the statute.** In other words, if the removal petition is sufficient and states facts sufficient as contemplated by the statute, then the cause is removed to the federal Court and the state Court is without jurisdiction. The sufficiency of the removal petition is the very question presented by this appeal, a question that has not been answered by appellees.

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**AS TO INTRODUCTION OF EVIDENCE OBTAINED THROUGH  
UNLAWFUL SEARCH AND SEIZURE.**

Appellees contend on page 9 of their brief that the Fourth Amendment has no application to state procedure. We thought it was clearly stated in our opening brief that appellant does not contend that the Fourth Amendment operates upon the states and that we had clearly distinguished between the **right** to be secure from unlawful searches and seizures and



the incorporation of such right into the Fourth Amendment. (See footnote on page 31 of Appellant's Opening Brief.) Thus appellees' argument that the Fourth Amendment does not operate on the states is beside the point.

Next, appellees contend that the right to introduce competent evidence, during the course of the trial, will not be denied solely on the ground that the evidence was unlawfully acquired. This proposition we have also admitted on page 15 of Appellant's Opening Brief.

But the fact that a trial Court will not stop a trial to ascertain in what manner competent evidence was procured, is a proposition entirely different from whether or not the state has provided any procedure **anterior to the trial** whereby the use of evidence acquired by unreasonable and unlawful search and seizure can be suppressed.

Where a state provides a remedy and procedure for the protection of the constitutional right, such remedy must be pursued by the person injured, otherwise he cannot complain at his trial of the introduction in evidence of the objects acquired by an unreasonable search and seizure. **Where, however, the state denies any such process and remedy anterior to the trial**, the question is not as to the right of a trial Court to admit such illegally acquired evidence, but resolves itself into the proposition that **the denial of such corrective and protective process in itself constitutes a denial of due process of law.**

In our opening brief we have demonstrated, by quotations from decisions of the California Supreme Court, that no remedy is available in the Courts of that State to protect the great right to be secure against unreasonable search and seizure. This is admitted by appellees on page 10 of their brief where they state "as indicated in *People v. Gonzales*, 20 Cal. (2d) 165, at page 169, **the only recourse** that the defendant may have is in civil and criminal remedies directly against the officers for their illegal acts."

If the only recourse a defendant may have is in civil and criminal remedies directly against the officers for their illegal acts, then it stands admitted that there is no process whereby the Constitutional right can either be protected or enforced. To prosecute a state officer for illegal entry or burglary, as the case may be, neither protects nor enforces the Constitutional right. To bring a civil action against the officers for damages for such illegal entry or unlawful taking of personal property does not protect or enforce the Constitutional right. These remedies merely compensate the defendant for a violation of his right or punish the state officer for violating the right. These remedies leave the violation of the right in exactly the same position as if such remedies had not been pursued. **In other words, restricting a defendant to civil and criminal remedies against the state official does not even pay lip service to the Constitutional right, but constitutes a declaration that once the right is violated a defendant in a criminal action must suffer all of the consequences of such violation and is**

impotent to invoke any judicial process whereby he can be placed in the position he occupied prior to the violation of such right.

Lastly, on this point, appellees argue that nothing can be gained by appellant by the removal into the federal Court of a criminal prosecution. This conclusion is based on the false premise that if the case were tried in the federal Court, the illegally acquired evidence could not be suppressed or excluded because no federal officer participated in its acquisition.

It is true that in prosecutions instituted in the federal Courts, for a violation of federal laws, it has been held that the Fourth Amendment only prohibits the use of evidence illegally acquired by federal officials. However, the removal of a state prosecution to the federal Courts does not turn it into a federal prosecution for a federal offense. The action still remains a state prosecution for a state offense, the only difference being that in the trial held in the federal Court, the accused will be assured all of his Constitutional rights. **It is for the purpose of insuring unto the accused the Constitutional rights denied him by the state law that the removal is permitted at all.** While the removal proceeding results in a change of forum, it does not change the nature of the charge, trial or prosecution.

WHERE PROVISIONS OF THE FEDERAL AND A STATE CONSTITUTION ARE IDENTICAL, ADOPTED TO SAFEGUARD THE SAME RIGHTS AND PREVENT OR CORRECT THE SAME EVILS, THEIR CONSTRUCTION AND APPLICATION MUST BE THE SAME.

Appellees have laid stress on the fact that Article I, section 19 of the California Constitution, reading as follows:

“The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.”

can be construed by the Supreme Court of California in any way it sees fit and that such Court has construed it as merely prohibiting the unlawful search and seizure, while allowing the fruits thereof to be used as evidence in a criminal trial against the person whose constitutional right has been violated.

That this provision of the California Constitution and the Fourth Amendment to the Federal Constitution were each adopted for the same reasons and to correct and prevent the same evils can brook no argument. The Supreme Court of California has so stated in *People v. Mayen*, 188 Cal. 237, 249,

“It may be taken for granted that the provisions of our own constitution and those of nearly all the states of the Union against unreasonable searches and seizures, and protecting the citizen from being compelled in any criminal case to be a witness against himself, have been adopted, in

almost the precise words and for the same reason, as in the federal constitution. They are safeguards designed to protect the intimate sanctity of the person and the home from invasion by the state."

The adoption of both the State and Federal Constitutional provisions against unlawful searches and seizures having been brought about as the result of the same evils, to correct the same abuses and to accord the same rights **they each must be given the same interpretation and effect.**

"But, as the manifest purpose of the constitutional provisions, both of the states and of the United States, is to prohibit the compelling of testimony of a self-criminating kind from a party or a witness, **the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties however differently worded, should have as far as possible the same interpretations; and that where the constitution, as in the cases of Massachusetts and New Hampshire, declares that the subject shall not be 'compelled to accuse or furnish evidence against himself;'** such a provision should not have a different interpretation from that which belongs to constitutions like those of the United States and of New York, which declare that no person shall be 'compelled in any criminal case to be a witness against himself'."

(Emphasis added.)

*Counselman v. Hitchcock*, 142 U. S. 547, 584, 35 L. ed. 1110, 1121.

But appellees argue that this Court is bound by the construction of the State Constitutional provision involved. Assuming the correctness of this premise for the sake of argument, what do we find? That the State Supreme Court has so construed the provision that there is no remedy, process or procedure whereby one, whose constitutional right has been violated, can be placed in the position he occupied prior to the violation of such right. Once his right to security has been violated by state officers he must suffer all the consequences of such violation; he cannot move to exclude or suppress as evidence the articles seized, he cannot have reviewed in the state appellate Courts the admission of such articles as evidence. In fact, he is in identically the same position as if no such prohibition appeared in the Constitution or laws of California.

If this Court is bound by the California decisions, then this Court must hold that by such decisions the State of California has denied the existence of the right and has failed to provide any remedy or process for its enforcement or protection.

But, this Court is not bound by any state construction of its constitution or laws, where such construction renders it in conflict with any provision of the Constitution of the United States.

**RESPECTABLE FEDERAL AUTHORITY EXISTS IN SUPPORT  
OF APPELLANT'S CONTENTION.**

In *Hague v. C. I. O.*, 101 Fed. (2d) 774, the United States Circuit Court of Appeals for the Third Circuit, in holding that the right to be secure from unlawful search and seizure was protected by the Fourteenth Amendment from state violation, said:

“The Fourth Amendment to the Constitution of the United States provides, ‘The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, \* \* \*.’ The right so protected is a fundamental civil right and in our opinion is a privilege of Federal citizenship. **As such it is secured against abridgment by the states by the privileges or immunities clause of the Fourteenth Amendment as well as by the due process clause of that Amendment.**” (p. 781.)

“\* \* \* it is elementary that the Bill of Rights was designed as a curb upon the power of the Federal government which it was feared might encroach upon the rights of the states. We are unable to perceive any reason, however, why the right to be free from unreasonable searches and seizures set forth in the Fourth Amendment should not stand upon a parity today with freedom of religion, of speech, of the press and of assembly as guaranteed by the First Amendment. All of these rights are of equal importance to the individual and in our opinion they stand as *pari materia*.

“Liberty of the person, including freedom of locomotion, is, as we have seen, one of ‘\* \* \*

the privileges or immunities of citizens of the United States \* \* \* protected by the Fourteenth Amendment against abridgment by the States. Among those rights and liberties of which the states may not deprive the individual under the due process clause of that Amendment are freedom of speech, *Stromberg v. California*, 283 U. S. 359, 51 S. Ct. 332, 75 L. Ed. 1117, 73 A. L. R. 1484, and freedom of the press, *Gitlow v. New York*, *supra*. In our opinion freedom from unreasonable searches and seizures is included as well." (pp. 787-8.)

"It follows therefore that the fundamental civil rights secured to citizens of the United States by the First and Fourth Amendments are secured in the sense of being protected or guaranteed against interference by State action by the Fourteenth Amendment." (p. 788.)

(The Supreme Court took over the above case but declined to pass on the question. [307 U. S. 496, 83 L. Ed. 1423.] )

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THE ORDER OF THE DISTRICT COURT DISMISSING THE  
COMPLAINT IS AN APPEALABLE ORDER.

Appellees, as a mere *ipse dixit*, state that "The order \* \* \* dismissing the complaint is conclusive, from which an appeal may not be taken," following which, on page 13 of their brief, there is cited seven cases and sec. 71 of 28 U.S.C.A.

Reading the section cited and the seven cases demonstrates that appellees are confused as to the matter



before the Court. The section and cases relate to an order remanding a cause to the state Court and have nothing to do with an order dismissing a complaint for an injunction.

Heretofore, in April of this year, appellees noticed a written motion before this Court to dismiss the appeal and advanced this identical point as a ground for such motion. On June 7, 1947, the motion came on for hearing before this Court and after argument was denied from the bench. This Court at that time held that an order dismissing a complaint in equity is an appealable order. Such is the law.

28 *U.S.C.A.*, sec. 227 (Judicial Code, sec. 129), expressly provides that when, in a District Court "an injunction is granted, continued, modified, refused or dissolved \* \* \* an appeal may be taken from such interlocutory order or decree to the Circuit Court of Appeals." Here the appeal was taken from the order 'granting defendants' motion to dismiss the complaint in the above entitled action and dismissing said complaint and indirectly denying complainant's application for an interlocutory injunction." (R. 32.)

In *Miami Paper Co. v. American Woodpulp Corp.* (C.C.A.-6), 5 Fed. (2d) 408, the Court held:

"Motion to dismiss the appeal must be denied. Appeal is the proper remedy to secure a reversal of a decree dismissing a bill in equity."

See also:

*United States v. City S. B. & T. Co.* (C.C.A.-6), 73 Fed. (2d) 486.

28 U.S.C.A., sec. 225, gives this Court appellate jurisdiction to review by appeal final decisions in the District Court. An order dismissing a suit is a final decision.

Appellees rely on 28 U.S.C.A. sec. 71. This section provides for the removal from the state to the federal Courts of **“any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States \* \* \* of which the District Courts of the United States are given original jurisdiction”** and for the removal of causes based on diversity of citizenship. This section further provides that if the District Court ordered **“the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the District Court so remanding such case shall be allowed.”** **This section 71 has no application to the case at bar,** and all the cases cited on page 13 of appellees’ brief relate to orders of remand made under this section.

The removal proceedings herein were taken under 28 U.S.C.A. sec. 74, which provides for the removal of **“any civil suit or criminal prosecution \* \* \* against any person who is denied or cannot enforce in the judicial tribunals of the state \* \* \* where such suit or prosecution is pending, any rights secured to him by any law providing for the equal civil rights of citizens of the United States.”** This section 74 contains no provision that no appeal shall be allowed from any order remanding such suit to the state Court.

No order remanding the cause was ever made. The propriety of such an order is not before this Court.

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### CONCLUSION.

Appellant's briefs herein have clearly established the following propositions, propositions which find no refutation in the brief for appellees:

1. The right to be secure from unreasonable search and seizure is a fundamental principle of liberty and justice to be regarded as of the very essence of constitutional liberty and is therefore protected from state violation by the Fourteenth Amendment;

2. The action of the state officers, in breaking and entering appellant's home without a warrant and taking the property therefrom, was a violation of such right;

3. The decisions of the California Supreme Court have repeatedly and consistently held that property acquired in such manner (a) cannot be excluded from evidence at the owner's trial under any circumstances; (b) that the California law neither recognizes nor provides any procedure or process whereby the accused, even though he make timely objection, can have the property so taken returned to him or suppressed as evidence; (c) that even though timely objection be made and such evidence be admitted over the accused's objection, the question of the admission in evidence thereof cannot be reviewed on appeal from a judgment of conviction or in any other manner;

(d) that there is no procedure known to or allowed by the laws of California whereby the victim of such unlawful search and seizure can be again placed in the position he occupied prior to the search and seizure.

4. The complaint herein and the petition for removal set up the Constitutional right, the violation of such right, the foregoing holdings of the State Supreme Court and the inability to enforce in the state Courts such rights. The complaint stated a cause of action and the order dismissing the cause should be reversed.

Dated, San Francisco,  
September 26, 1947.

Respectfully submitted,

LEO R. FRIEDMAN,

*Attorney for Appellant.*

No. 11,573

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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ALEXANDER STEELE,

*Appellant,*

VS.

THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA, IN AND FOR THE CITY  
AND COUNTY OF SAN FRANCISCO,  
et al.,

*Appellees.*

Upon Appeal from the District Court of the United States for the  
Northern District of California, Southern Division.

SUPPLEMENTAL BRIEF FOR APPELLANT.

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PAUL P. O'BRIEN,

CLERK



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---

At oral argument Judge Denman queried as to whether the language of the removal statute (28 U. S. C. A. 74) reading as follows:

“\* \* \* any right secured to him by any law providing for the **equal** civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States \* \* \*”

did not mean, in view of the word “equal”, that no case fell within the statute unless some law of the state made an unlawful discrimination between persons similarly situated.

The writer answered this query by stating that he did not think the statute referred merely to state action which denied the equal protection of the laws to some while granting it to others; but, in his opinion, that the statute referred to state action which denied to all persons in the state a right that was to be equally enjoyed by all persons throughout the United States. While this answer was and is correct it was not fully or properly stated.

An entirely correct answer would be that the removal statute operates in all cases where the state, by law, has abridged a privilege or immunity of a citizen of the United States.

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**THE MANNER IN WHICH THE DENIAL OF THE RIGHT  
HEREIN WAS RAISED.**

While much was said at oral argument as to due process of law, a reading of the record discloses that this was only one of the grounds urged for the removal.

The complaint (Par. 1, R. 2) starts out with the allegation: "That at all times herein mentioned the complainant, Alexander Steele, was and now is a **citizen of the United States.**"

The removal petition (R. 11) contains the same allegation as to United States citizenship.

The petition, after alleging the unlawful entry into Steele's home and the taking of his papers by the police officer, then alleges that such action was "in

violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States **and** in violation of petitioner's right to be secure in his person, house, papers and effect against unreasonable searches and seizures." Thus, it here is alleged that the unlawful search and seizure violated two rights of Steele, as a citizen of the United States.

The removal petition further alleged (R. 18) that the evidence so secured by the officer was procured in violation of Steele's right "to be secure against unlawful search and seizure"; and that the use of such evidence against him at his trial "will result in said petitioner being tried in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States."

The further contention of Steele's is summed up in paragraph XI of the removal petition as follows (R. 21):

"That by reason of the foregoing matters and things petitioner is being denied and cannot enforce in the judicial tribunals of the State of California and/or in the part of the State where such criminal proceeding, aforesaid, is pending against him, to wit: in the City and County of San Francisco, State of California, **all of the rights secured to him by the laws of the United States providing for the equal civil rights of citizens of the United States** and is being and will be deprived of **the equal protection of the law** and of due process of law as the same are assured and guaranteed to him by section 1 of the Fourteenth Amendment to the Constitution of the United

States, which provide that 'no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law or deny to any persons within its jurisdiction the equal protection of the law.' And is further being deprived and denied and will be deprived and denied the rights secured unto him by section 1977 of the Revised Statutes of the United States as set forth in Title 8, U.S.C.A. sec. 41. And that in addition thereto defendant is being and will be deprived of a fair and impartial trial as the same is known at common law and guaranteed to all of the people of the State of California by the Constitution of the United States."

Thus, Steele not only urged that the removal should take place under the due process clause, but also advanced additional grounds covering all of the first division of the 14th Amendment.

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**THE PHRASE "ANY LAW PROVIDING FOR THE EQUAL CIVIL RIGHTS OF CITIZENS OF THE UNITED STATES," INCLUDES ANY RIGHT, PRIVILEGE OR IMMUNITY OF A CITIZEN OF THE UNITED STATES.**

We will now demonstrate that the foregoing phrase means each of the following things: (a) That a civil right of a citizen of the United States is a right that must be observed and protected throughout and by each of the States of the Union; (b) That such a right may be declared by the Constitution or a positive law of the United States, or by a law or Consti-

tutional provision protecting a right existing before and at the time of the adoption of the Constitution.

There is a distinction between citizens of the United States and citizens of a state. Each citizenship has its own privileges and immunities. A state may abridge the privileges and immunities of state citizens, but cannot abridge the privileges or immunities of citizens of the United States. (*The Slaughter-House* cases, 83 U. S. 36, 73 to 77).

A privilege or immunity of Federal citizenship need not find expression in any positive statute of the United States before it will be protected by the 14th Amendment:

“The 14th Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but **every prohibition implies the existence of rights and immunities, \* \* \***”

*Strauder v. Virginia*, 100 U. S. 303, 25 L. ed. 664, 666.

and later on the same page the Court in the *Strauder* case states:

“A right or an immunity, whether created by the Constitution or only guaranteed by it, even without any express delegation of power, may be protected by Congress.”

Then the Court, on authority of *United States v. Reese*, 92 U. S. 214, holds that the removal statute is the appropriate method for protecting such a right guaranteed by the 14th Amendment.

It should be noted that while every right covered by the "due process clause" is not included in the "privilege or immunity clause", **every denial of a privilege or immunity of a citizen of the United States also involves a lack of due process.** This distinction becomes important as many of the fundamental rights of citizens of the United States are discussed in cases where the only constitutional question involved was one raised under the due process clause.

The Supreme Court has never attempted to define the privileges and immunities of citizens of the United States, though a partial list of such things was set forth in the *Slaughter-House* cases, *supra*, at p. 79; but in that case and many following, the Court stated that such privileges and immunities are such as "owe their existence to the Federal Government, its national character, its Constitution, or its laws." This same general rule has been re-stated in many subsequent cases, of which we cite but two of the more recent ones:

*Breedlove v. Suttles*, 302 U. S. 277;

*Snowden v. Hughes*, 321 U. S. 1.

As indicative of the character of the privileges and immunities of citizens of the United States as protected by the Fourteenth Amendment, we call attention to the following matters and things which, despite the ruling in *Twining v. New Jersey*, 211 U. S. 78, holding that the first eight Amendments are not incorporated within the Fourteenth Amendment, are now held to be protected by the Amendment.

In *Hague v. CIO*, 307 U. S. 496, it was held that the right to peaceably assemble and discuss matters of national concern was a privilege of United States citizenship. Thus, at page 512, the Supreme Court stated:

“Although it has been held that the Fourteenth Amendment created no rights in citizens of the United States, merely secured existing rights against state abridgement, it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the Amendment protects.”

In *Schneider v. Irvington*, 308 U. S. 147, 160, it is held that freedom of speech and freedom of the press as secured by the First Amendment from abridgement by the United States are secured to all persons by the Fourteenth Amendment against abridgement by a state.

In the *Slaughter-House* cases, *supra*, it is held that the privilege of the writ of habeas corpus is a right of a citizen guaranteed by the Federal Constitution.

The right of freedom of religion is also an attribute of Federal citizenship. *Everson v. Board of Education*, 91 L. ed. Ad. Op. 472, 476, 479.

The general character of privileges and immunities of citizens of the United States being thus outlined, we come to the question of whether the right to be secure from unreasonable search and seizure falls within the constitutional provision.

In our Opening Brief, we set forth many cases dealing with the character of this right and we repeat some of the language which we have already quoted.

In *Gouled v. United States*, 255 U. S. 298, the Court points out that the right to be secure from unreasonable search and seizure is different from the right to be accorded due process of law. Its language is as follows:

“The effect of the decisions cited is that such rights are declared to be indispensable to the ‘full enjoyment of personal security, personal liberty and private property’; that **they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen—the right, \* \* \* to due process of law.**”

We have already referred this Court to the recent decision in *Harris v. United States*, 91 L. ed. Ad. Op. 1013, 1016, where the foregoing language in the *Gouled* case is quoted with approval.

In *Boyd v. United States*, 116 U. S. 616, the Court holds the right to be of “the very essence of constitutional liberty and security”.

In *Go-Bart Importing Co. v. United States*, 282 U. S. 344, the Court states:

“Since before the creation of our government, **such searches have been deemed obnoxious to fundamental principles of liberty.** They are denounced in the constitutions or statutes of every state in the Union. *Agnello v. United States*, 269



U. S. 20, 33, 70 L. ed. 145, 149, 51 A. L. R. 409, 46 S. Ct. 4. The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted."

On page 42 of our Opening Brief we summarized the decisions of the Supreme Court emphatically stating the nature of the right to be "indispensable to the 'full enjoyment of personal security, personal liberty and private property' \* \* \* to be regarded as the very essence of constitutional liberty" (*Harris v. United States*, supra; *Gould v. United States*, supra); that it is as an "indefeasible right of personal security" (*Boyd v. United States*, supra); and a principle "of humanity and civil liberty." (*Weeks v. United States*, infra).

Any right that is the very essence of constitutional liberty, indefeasible and indispensable, and a principle of civil liberty, must be a right and privilege adhering to every citizen of the United States. The War of the Revolution was fought to procure such rights and our subsequent wars fought to preserve them. If such be not rights of United States citizenship, then there is no protection, constitutional or otherwise, for their protection and enforcement.

Turning back to *Boyd v. United States*, supra, the announced nature of the right was derived from the

history leading up to the adoption of the Fourth Amendment and our Supreme Court, among other things stated (p. 625):

“The practice had obtained in the Colonies, of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced ‘the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;’ since they placed ‘the liberty of every man in the hands of every petty officer.’ This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. ‘Then and there,’ said John Adams, ‘then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child of Independence was born.’

These things and the events which took place in England immediately following the argument about writs of assistance in Boston were fresh in the memories of those who achieved our independence and established our form of government.”

Compare the history of events leading up to the Fourth Amendment as set forth in the *Boyd* case, with the history of events leading up to the adoption of the First Amendment as set forth in the *Everson* case, *supra*, beginning with page 476.

As the right to be secure from unreasonable search and seizure was the most prominent event which inaugurated resistance of the Colonies to the oppressions of England and resulted in the birth of Independence and the first act leading up to the Revolutionary War, how can it be said that such a right is not a fundamental principle of American citizenship?

If the right to be secure from unreasonable search and seizure was one of the things fought for in the Revolutionary War, then it perforce must be a right secured by that war and to be enjoyed by all citizens of the United States.

See also *Weeks v. United States*, supra, p. 390, where the history is again discussed.

Lastly, we discuss the cases dealing with the right of removal under the statute.

In *Strauder v. West Virginia*, 100 U. S. 303, 10 Otto 303, a negro was indicted for murder in the state Court. He sought removal to the federal Court on the ground that being a former slave, he believed he could not have the full and equal benefit of all the laws in the same degree that such benefits would be enjoyed by white citizens. The Court in speaking of the Fourteenth Amendment held that while the language relating to the privileges and immunities was prohibitory, they contained a necessary implication of a positive immunity or right. The Court held that the laws of West Virginia discriminated against negroes; that the removal statute was a proper exercise of the federal power; that the removal petition was sufficient and

transferred the cause to the federal court and that the action of the state Court in proceeding to trial, after the filing of removal petition, was error.

In *Ex parte Virginia*, 100 U. S. 313, 10 Otto 313, another removal was sought. The general doctrines announced in the *Strauder* case were upheld. The state Court had refused to surrender jurisdiction and the Supreme Court upheld the state Court in this instance on the ground that the statutes of Virginia did not deny him any right but only the manner in which they were being executed.

In *Neal v. Delaware*, 103 U. S. 370, the defendant had been indicted for rape in the state Court. He filed a petition for removal to the federal Court. The state denied the removal and it was upheld on the ground that there was no law or constitutional provision of the state denying any federal right guaranteed by the Constitution.

In *Kentucky v. Powers*, 201 U. S. 1, we again had a case where the Court draws a distinction between the manner in which state officers enforce a law and the law of the state itself. The Court held that the right must be one denied by the constitution or laws of the state, otherwise there could be no removal under the statute. The Court closed its decision by distinguishing between the right of removal before trial and the ability to have a constitutional right protected after trial and in so doing, held that where the constitution or laws of the state denied one a fundamental right of United States citizenship, the case can

be removed before trial under the removal statute, but where a constitutional right is denied other than by the constitution or laws of the state, it can only be reviewed in the federal Court after trial and from a ruling of the highest Court of the state refusing to enforce such right.

As we have argued, the Constitution of California, as construed by the highest Court of the state, not only denied the existence of the right contended for but denies any process or procedure in the state Courts by which the right can be protected prior to trial or availed of in any manner. In this regard, we refer the Court to the case of *Weeks v. United States*, supra, where the right to be placed in the position one occupied prior to unreasonable search and seizure is upheld and distinguished from a case where no motion to suppress the evidence was made prior to trial.

The appellees argue that nothing could be gained by removing this case to the federal Court because in the latter Court the right could not be protected as the unlawful search and seizure had not been made by a federal officer. This is completely answered by the case of *Tennessee v. Davis*, 100 U. S. 257, 25 L. ed. 648, 653, where it is held that on removal, the federal Court will adopt and apply the laws of the state, according to the defendant any defense or right guaranteed him by the Constitution or laws of the United States.

THE CONSTITUTIONAL PROVISION, AS CONSTRUED BY THE CALIFORNIA SUPREME COURT, DENIES THE EQUAL PROTECTION OF THE LAWS AND MAKES AN UNLAWFUL DISCRIMINATION BETWEEN CITIZENS.

The Supreme Court of California has so construed the State Constitutional provision as to deny to all within the state boundaries the right to enforce or protect in any manner the privilege and immunity to be secure from unreasonable search and seizure. In so doing the state denied the equal protection of the laws and has made an unlawful discrimination between persons occupying the same position and entitled to enjoy the same rights.

The foregoing is manifest if we compare the rights of persons who have been subjected to an unreasonable search and seizure without any warrant having been issued and those who have been so subjected although a warrant had been issued.

Sections 1523 to 1541 of the California Penal Code provide for the issuance of search warrants and the procedure to be followed on the return thereon.

Sections 1524 and 1525 provide for the instances in which such a warrant may be issued and that it cannot "be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched."

Section 1535 provides that the officer executing the warrant must give a receipt for the property taken to the person from whom it was taken.

Section 1537 provides that the officer must forthwith return the warrant, after execution, to the magistrate together with a written inventory of the property taken.

Section 1539 states that "if the grounds on which the warrant was issued be controverted, he (the magistrate) must proceed to take testimony in relation thereto \* \* \*"

Section 1540 provides:

"If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken."

Here we have a procedure where, **if the officer proceeds in a lawful manner and takes property under a search warrant**, the person from whom the property was taken has his day in Court and if it be determined that the search was unreasonable, in that no probable cause existed for the issuance of the warrant, the property must be returned to him.

Compare this with an instance **where the officer proceeds in an unlawful manner without a search-warrant**, and unlawfully breaks into the home of a person and takes property therefrom. In this instance the owner of the property has no redress; he cannot by motion or otherwise have his day in Court; he cannot have it determined whether the search was or was not unreasonable; he cannot have his property restored to him although it be admitted that the search and

seizure was both unlawful and unreasonable; he is helpless and the property, which would have been promptly returned to him if the search had been conducted under a warrant, is withheld from him and used as evidence against him in a criminal prosecution.

All persons within the State of California are entitled to the full protection of the constitutional right and to equal opportunity to preserve and vindicate that right. All persons are entitled to be secure in their homes, papers and effects from unreasonable search and seizure.

To provide a means for enforcing the right where the state officers proceed in a lawful manner and to deny any means for enforcing the right where the officers proceed in an unlawful manner, results in a denial of the equal protection of the laws and constitutes an unlawful discrimination between persons identically situated and entitled, without reservation, to the same rights and remedies.

Dated, San Francisco,  
October 18, 1947.

Respectfully submitted,

LEO R. FRIEDMAN,

*Attorney for Appellant.*



No. 11,573

IN THE

United States Circuit Court of Appeals  
For the Ninth Circuit

---

ALEXANDER STEELE,

*Appellant,*

VS.

THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA, IN AND FOR THE CITY  
AND COUNTY OF SAN FRANCISCO, and  
ALFRED J. FRITZ and ROBERT Mc-  
WILLIAMS, as Judges thereof,  
*Appellees.*

APPELLANT'S PETITION FOR A REHEARING.

(Or, if a Rehearing Be Denied, For a Stay of Mandate.)

---

LEO R. FRIEDMAN,

935 Russ Building, San Francisco 4,

*Attorney for Appellant  
and Petitioner.*

FILED

JAN 5 1948

PAUL P. O'BRIEN,  
CLERK



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No. 11,573

IN THE  
**United States Circuit Court of Appeals**  
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ALEXANDER STEELE,

*Appellant,*

VS.

THE SUPERIOR COURT OF THE STATE OF  
CALIFORNIA, IN AND FOR THE CITY  
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ALFRED J. FRITZ and ROBERT MC-  
WILLIAMS, as Judges thereof,

*Appellees.*

**APPELLANT'S PETITION FOR A REHEARING.**

**(Or, if a Rehearing Be Denied, For a Stay of Mandate.)**

---

*To the Honorable Francis A. Garrecht, Senior Judge  
and to the Honorable Associate Judges of the  
United States Circuit Court of Appeals for the  
Ninth Circuit:*

Alexander Steele, appellant above named, hereby petitions for a rehearing of this cause after decision rendered and filed on December 8, 1947.

The action dismissed by the District Court was one for an injunction to restrain the trial Court from proceeding with the trial of a criminal cause, said

injunctive relief being based on the claim that said criminal cause had been removed to the District Court pursuant to a removal petition filed in accordance with Sec. 31 of the Judicial Code (28 U.S.C.A. 74).

This Court upheld the action of the lower Court on the ground that the facts claimed to justify such removal did not fall within the provisions of the statute providing that such removal can be had where one has been denied "any right secured by any law providing for the **equal** civil rights of citizens of the United States." (Emphasis by this Court.)

In upholding the action of the lower Court this Court held as follows, each of which holdings we believe to be erroneous:

(a) That the use as evidence of articles acquired by an unlawful and unreasonable search and seizure deals exclusively with state procedure relating to the admissibility of evidence;

(b) That the right to admit such articles in evidence was in accordance with "the procedure adopted by the California courts" and, as such procedure "has been applied with **equality** as to all citizens of the United States who come before those courts", it does not violate "some **equal** civil right," as such violation can only occur when there is a discrimination between persons occupying an identical **status**, such as racial discrimination.

In addition to the foregoing, it is submitted that this Court has failed to consider certain important contentions raised by appellant which will hereafter be discussed.

**THIS COURT HAS MISCONCEIVED THE PHRASE "EQUAL CIVIL RIGHTS" BY RESTRICTING IT TO CASES WHERE THERE IS AN UNLAWFUL DISCRIMINATION BETWEEN PERSONS EQUALLY SITUATED.**

In holding that the Removal Statute can only be invoked where state action has resulted in an unlawful discrimination between persons occupying the same identical positions before the law, this Court has placed a construction upon the Removal Statute sanctioned neither by its words nor by the decisions of the Supreme Court of the United States.

Appellant's contention has been that the Removal Statute becomes operative whenever a state denies a civil right that all persons throughout the United States are entitled to equally enjoy, even though within the geographical limits of the state such denial operates equally upon all persons therein. In other words, state boundaries are wiped out in determining whether an equal civil right has been denied and such denial takes place where the enjoyment of the right is foreclosed, whether such foreclosure operates upon one or a class or all of the persons within the jurisdiction of a particular state. Such is the law as announced by the Supreme Court of the United States.

In *Colgate v. Harvey*, 296 U.S. 404, 80 L.ed. 299, the Supreme Court has laid this proposition at rest in the following holdings:

At page 426, it is stated:

"But, assuming that the State of Vermont is benefited by the exemption, the complete answer is that appellant is a citizen of the United States;

and, quite apart from the equal protection of the laws clause, the suggestion is effectively met and overcome, and the fallacy of other attempts to sustain the validity of the exemption here under review clearly demonstrated, by reference to the privileges and immunities clause of the Fourteenth Amendment. 'For all the great purposes for which the Federal government was formed,' this court has said, 'we are one people, with one common country.' *Crandall v. Nevada*, 6 Wall. 35, 48, 49, 18 L. ed. 745, 748, 749. **As citizens of the United States we are members of a single great community consisting of all the states united and not of distinct communities consisting of the states severally.** No citizen of the United States is an alien in any state of the Union; and the very status of **national citizenship connotes equality of rights and privileges, so far as they flow from such citizenship, everywhere within the limits of the United States.** This fact is obvious and vital and no elaboration is required to establish it." (Emphasis supplied.)

The foregoing demonstrates two propositions, viz.: (a) that the privilege and immunity clause of the Fourteenth Amendment is something separate and distinct from the equal protection of the laws clause and (b) that the privilege and immunity clause means that such privileges and immunities must be enjoyed alike by all persons throughout the United States and not merely by all persons within one of the United States. Therefore, an equal civil right means a right that is to be enjoyed by all throughout the United States and an equal civil right is denied when



any one state refuses to enforce it within the confines of its own borders.

Again, in *Colgate v. Harvey*, supra, at page 428, the Supreme Court quotes from the *Slaughter House Case* as follows:

“But the fourteenth amendment prohibits any state from abridging the privileges or immunities of the citizens of the United States, whether its own citizens or any others. It not merely requires equality of privileges; but **it demands that the privileges and immunities of all citizens shall be absolutely unabridged, unimpaired.**”

Lastly, in *Colgate v. Harvey*, the Supreme Court states:

“One purpose and effect of the privileges and immunities clause of the Fourteenth Amendment, read in the light of this interpretation, was to bridge the gap left by that article so as also to safeguard citizens of the United States against any legislation of their own states having the effect of denying equality of treatment in respect of the exercise of their privileges of national citizenship in other states. A provision which thus extended and completed the shield of national protection between the citizen and hostile and discriminating state legislation cannot be lightly dismissed as a mere duplication, or of subordinate or no value, or as an almost-forgotten clause of the Constitution.”

The foregoing holdings demonstrate the error in this Court's decision. Equality of operation within state limits is not the test. Equality throughout the

United States is the demand of the Constitution and a denial of such equality within any defined portion of the United States constitutes a violation of the Constitution. The right not to be deprived in any way of life, liberty and property, except in accordance with law, is an attribute of United States citizenship. (*Allgeyer v. Louisiana*, 165 U.S. 578, 589, 41 L. ed. 832, 835.) Inherent in the right of liberty is the right to be secure in one's home against unreasonable search and seizure. Where a state denies this right to all within its boundaries, it is denying an equal civil right guaranteed by the Constitution.

We submit that the language of this Court is in conflict with the holdings of the Supreme Court of the United States and, for such reason alone, a rehearing of this cause should be granted.

---

**STATE PROCEDURE AND RULES OF EVIDENCE MAY NOT RUN COUNTER TO CONSTITUTIONAL RIGHTS AND PRIVILEGES.**

This Court has upheld the action of the California Courts on the ground that the state decisions, allowing the use as evidence of articles acquired by unreasonable search and seizure, deal merely with state rules of evidence.

The fact that a constitutional right may be denied under the guise of local practice relating to the admissibility of evidence has been refuted by the Supreme Court.

Whether or not an extra-judicial confession is admissible in evidence may be classified merely as a state

rule relating to what is competent evidence at a trial within the state. However, the Supreme Court of the United States has time and again reversed convictions where such confessions were obtained in a manner condemned by the Fourteenth Amendment.

(See:

*Brown v. Mississippi*, 297 U.S. 278;

*Chambers v. Florida*, 309 U.S. 227.)

In *Mooney v. Holohan*, 294 U.S. 103, the Supreme Court of the United States held that the knowing use of perjured testimony by state officers for the purpose of procuring a conviction was a denial of a right guaranteed by the Constitution. Here again we have a case where the sole question involved was the admissibility of evidence and the Federal Supreme Court did not brush it aside on such ground.

Where one has a constitutional right, he is entitled to the enjoyment of such right and such enjoyment cannot be defeated by the enactment of a mere rule of evidence.

In *Brown v. Mississippi*, supra and *Angel v. Bulington*, 91 L. ed. Adv. Op. 557, 560, it is expressly held that constitutional rights can not be evaded or denied under the guise of local practice or procedure.

THIS COURT HAS FAILED TO PASS ON ONE OF THE MAIN CONTENTIONS OF APPELLANT, TO-WIT: THAT THE STATE COURT DENIES ANY REMEDY FOR THE PROTECTION OF THE CONSTITUTIONAL RIGHT.

The decision of this Court is confined to the admissibility of evidence, no matter how acquired, at the trial of an accused. We have freely admitted that a trial Court need not stop a trial for the purpose of enquiring into the method by which state evidence was acquired. This is entirely different from a situation where the state has denied any method or procedure, to be resorted to prior to the trial, whereby a determination can be had as to whether the means used for acquiring the evidence violated a constitutional right.

Where the state denies any means, method or procedure for the enforcement or protection of a constitutional right, this, in and of itself, constitutes a violation of a constitutional right.

Rights guaranteed by the Constitution are not mere matters of words. The declarations of such rights carry with them the right and ability to enforce them.

In *Brown v. Mississippi*, supra, the Court closed its opinion by holding that a conviction and sentence procured in an unconstitutional manner could be challenged in any appropriate manner or proceeding. This must mean that the denial of a constitutional right carries with it the inherent right to some process by which such right can be enforced and protected.

In *Silverthorn Lumber Company v. United States*, 251 U.S. 282, papers of the defendants were taken

by Federal officers as the result of an unreasonable search and seizure. A motion for their return was granted. The government had made copies thereof and used such copies for the purpose of procuring new indictments. The Supreme Court held that the new indictments could not be based on copies of evidence unlawfully acquired, that such indictments had to be quashed and the copies of such evidence returned to defendants. Here again we find the Court upholding the right by giving to the accused process for the enforcement thereof. To the same effect is the case of *Nardone v. United States*, 308 U.S. 338.

In the Federal Courts, the rule prevails that a trial need not be stopped in order to enquire into the methods used for the acquiring of evidence, but the Federal Courts accord to an accused remedies, to be exercised prior to the trial, whereby unlawfully acquired evidence can be suppressed. The California Courts have denied such methods of relief and in California there is no way in which the right to be secure from unlawful search and seizure can be protected or corrected once that right has been violated.

We submit that this Court was in error in confining its decision to what could or could not be done at the trial and in failing to consider the denial of all means of redress prior to the trial.

## CONCLUSION.

It is respectfully submitted that the decision of this Court is in error and that a rehearing should be granted for the purpose of further arguing and deciding the points hereinabove stated.

In the event of a denial of this petition, appellant asks for a stay of the mandate of this Court for a period of 45 days to enable appellant to apply to the Supreme Court of the United States for a writ of certiorari.

Dated, San Francisco,  
January 5, 1948.

LEO R. FRIEDMAN,  
*Attorney for Appellant  
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,  
January 5, 1948.

LEO R. FRIEDMAN,  
*Counsel for Appellant  
and Petitioner.*





No. 11578

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

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Transcript of the Record

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Upon Petition to Review a Decision of the Tax Court  
of the United States







No. 11578

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United States  
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Transcript of the Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## APPEARANCES

For Taxpayer :

ROBERT A. WARING.

For Commissioner :

A. J. HURLEY.

Docket No. 9643

MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

## DOCKET ENTRIES

1945

Nov. 21—Petition received and filed. Taxpayer notified. Fee paid.

21—Copy of petition served on General Counsel.

21—Request for hearing at Los Angeles filed by taxpayer. 11/27/45 Granted.

Dec. 27—Answer filed by General Counsel.

1946

Jan. 2—Copy of answer served on taxpayer, Los Angeles, Calif.

Apr. 8—Motion to advance hearing of petition filed by taxpayer. 4/11/46 granted.

16—Hearing set Jun. 10, 1946, Los Angeles, California.

June 20—Hearing had before Judge Black on the merits. Cases to be consolidated as requested by stipulation of facts. Stipulation of Facts filed. Briefs due Aug. 5, 1946. Replies due Sept. 5, 1946.

July 8—Transcript of hearing 6/20/46 filed.

1946

Aug. 1—Brief filed by taxpayer.

5—Motion for extension of time to Sept. 4, 1946 to file brief filed by General Counsel. 8/6/46 granted.

Sept. 6—Motion for leave to file the attached brief, brief lodged, filed by General Counsel. 9/9/46 granted.

9—Taxpayer's brief served on respondent.

Oct. 24—Findings of fact and opinion rendered, Judge Black. Decision will be entered for the respondent. 10/24/46 copy served.

25—Decision entered, Judge Black, Div. 15.

1947

Jan. 21—Petition for review by U. S. Circuit Court of Appeals for the Ninth Circuit filed by taxpayer.

21—Proof of service of petition for review filed.

Mar. 5—Order from U. S. Circuit Court of Appeals for the Ninth Circuit extending the time to 3/20/47 to file statement of evidence, statement of points, designation of parts of record to be printed, and designation of contents of record, with service acknowledged thereon filed.

10—Stipulation as to venue filed.

24—Agreed statement of evidence filed.

24—Taxpayer's statement of points to be relied on and designation of parts of the record to be printed filed with proof of service thereon.

1947

Mar. 24—Designation of contents of record on review with proof of service thereon filed by taxpayer. [1\*]

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The Tax Court of the United States

Docket No. 9643

MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

### PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Collector of Internal Revenue, Sixth District of California, in his notice of deficiency (Symbols IT:JBS:FWW) dated August 28, 1945, and as a basis of his proceeding alleges as follows:

1. The petitioner is a married individual with residence at 246 N. Avenue 49, Los Angeles 42, California—Serial No. 2509815-1944. The return for the period here involved was filed with the collector for the Sixth District of California. His wife's name is Eleanor J. Downs, and a like petition to this court is filed simultaneous herewith.

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\* Page numbering appearing at foot of page of original certified Transcript of Record.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on August 28, 1945.

3. The taxes in controversy are personal income taxes for the taxable year ending December 31, 1943, and the amount in dispute is \$225.79 plus interest in the amount of \$14.29, making a total of \$240.08. There is no dispute as to the tax on \$1891.21 received in 1942, for personal services rendered in the United States at Burbank, California, prior to June 30, 1942, for the Vega Aircraft Corporation and Lockheed Overseas Corporation, which tax [2] amounts to \$121.90 and has been paid by the taxpayer.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) In determining the net income for the year 1943, the Commissioner and Revenue Agent in Charge erroneously included the sum of \$5,438.50 earned outside of the United States by taxpayer while a bona fide resident of North Ireland.

5. The facts upon which petition relies as the basis of this proceeding are as follows:

(a) That at all times during the periods in question taxpayer Michael Downs was a bona fide resident of the British Isles and North Ireland within the meaning of the Revenue Code, particularly Sec. 116 thereof, and as the term resident is defined in Regulations 111, Section 29.211-2 thereof.

He embarked at New York City, June 30, 1942, on H.M.S. Aorangi, bound for and arriving at Glasgow, Scotland, July 14, 1942. He thereafter resided in the British Isles and North Ireland until his return to the United States on July 12, 1944, leaving the British Isles July 2, 1944, on U.S.S. George Washington.

It was his intention when he entered the employ of Lockheed Overseas Corporation to continue with them overseas for the duration of the war and as long thereafter as necessary for their performance of their agreements with the United States Army; he so committed himself in his application to the corporation before going overseas, and in May, 1943, he further signed a contract with said corporation confirming this understanding; and at no time during said period did he or could he have any definite intention to return to the United States and in fact the then hazards of war made it uncertain [3] whether he might ever be able to return to the United States.

Wherefore, petitioner prays that this court may hear the proceedings and determine that there is no deficiency due from petitioner for the year ending December 31, 1943 (including therein any deficiency for the year 1942).

/s/ ROBERT A. WARING,  
Counsel for Petitioner.

State of California,  
County of Los Angeles—ss.

Michael Downs being duly sworn, says that he is the petitioner above-named; that he has read the foregoing petition and is familiar with the statements contained therein and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

/s/ MICHAEL DOWNS.

Subscribed and sworn to before me this 17th day of November, 1945.

PAULINE BLOK. [4]

[Title of Cause.]

Serial No. NI-2509815-1944

APPLICATION REGARDING HEARING  
AT LOS ANGELES

To the Tax Court of the United States:

Application is hereby made to the above entitled court that the petition in above matter be heard at Los Angeles in District Sixth California at as early a date as the Court can fix for same.

Respectfully submitted.

/s/ MICHAEL DOWNS,

Petitioner,

/s/ ROBERT A. WARING,

Attorney for Petitioner. [5]

## EXHIBIT A

Treasury Department, Internal Revenue Service  
Los Angeles 12, California

August 28, 1945

Office of the Collector, Sixth District of California,  
in replying refer to IT:JBS:FWW, Room 1242  
Federal Building

Mr. Michael Downs  
246 North Avenue 49  
Los Angeles 42, California

Serial No. NI-2509815-1944 List

Dear Mr. Downs:

On July 24, 1945, you were notified of an apparent deficiency in your income tax for 1943 and advised of your privilege to file a protest within 30 days from that date. No protest has been received in this office.

The correct amount of the deficiency has been finally determined to be \$225.79 (see attached explanatory statement). Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter you may file a petition with the Tax Court of the United States, Washington 25, D. C., for a redetermination of the deficiency.

If you consent to the proposed assessment, you are requested to sign the enclosed agreement and notice and demand for payment will be sent you,



or you may immediately forward remittance for the deficiency tax and interest now due to the Collector of Internal Revenue, Los Angeles 12, California.

Very truly yours,

JOSEPH D. NUNAN, Jr.,

Commissioner of Internal Revenue

By HARRY C. WESTOVER,

Collector of Internal Revenue.

Enclosures:

Statement

Form 903

FWW/as [6]

Office of Collector of Internal Revenue  
Los Angeles, Calif.

Acct. No. NI-2509815-1944 List

Examining Officer: Daniel Sagor

Date: July 11, 1945

In re: Michael Downs

246 North Avenue 49

Los Angeles 42, California.

Collector of Internal Revenue,  
Los Angeles, California.

An examination of the returns of the above-named individual for the years 1942 and 1943 disclosed the following income tax liability:

Summary

Year	Additional Tax	Interest	District Filed
1943 .....	\$225.79	\$14.29	Maryland

Authority for Examination: 1943 Return, Form 1040.

Taxpayer's income was derived from salaries as an employee.

Taxpayer and his spouse, Eleanor J. Downs, were married during the entire taxable year and they have three dependent minor children. Taxpayer and his spouse are California residents and their income is community income.

Taxpayer filed a nontaxable return for 1943 claiming exemption under Section 116 of the Internal Revenue Code. In a statement attached to this return taxpayer advises that "for the period from June 30, 1942 to July 12, 1944 \* \* \* he was a bona fide resident of the British Isles and North Ireland. \* \* \*"

Taxpayer's spouse did not file a return for 1943 claiming no taxable income.

Taxpayer has not established that he was "a bona fide resident of a foreign country or countries" within the meaning of Section 116 of the Internal Revenue Code. The amounts shown below are therefore restored to income, as community income, and the tax for 1943 determined as indicated.

Income from

Lockheed Overseas Corporation, Burbank, Calif.....	\$5,438.50
Bullock's Inc., Los Angeles, California.....	25.31
	<hr/>
	\$5,463.81
	<hr/>
One-half to each spouse.....	\$2,731.91

Corrected income tax net income.....		\$2,731.91
Less: Personal exemption .....	\$425.00	
Credit for dependents .....	700.00	1,125.00
		<hr/>
Balance (surtax net income).....		1,606.91
Earned income credit .....	273.19	273.19
Balance subject to normal tax.....		1,333.72
Normal tax (6% of \$1,333.72).....		80.02
Surtax on \$1,606.91 .....		208.90
		<hr/>
Total income tax .....		288.92
Net victory tax .....		59.02
		<hr/>
Total .....		347.94
1942 Tax (see computation, page 3).....	32.60	
Forgiven portion .....	32.60	
Unforgiven portion .....		None
		<hr/>
		347.94
Less: Income and victory tax withheld by employer .....	.25	
Income tax paid on 1942 return.....	121.90	
		<hr/>
Total payments .....		122.15
		<hr/>
Unpaid balance of income and victory tax.....		225.79
Tax previously assessed .....		None
Additional tax .....		225.79
Interest to 11/29/45.....		14.29
		<hr/>
Amount recommended for assessment .....		\$ 240.08
		<hr/> <hr/>
Recomputation of Victory Tax		
Corrected victory tax net income.....		\$2,731.91
Less: Specific Exemption .....		624.00
		<hr/>
Income subject to victory tax.....		2,107.91
Victory tax before credit .....		105.40
Victory tax credit (44%).....		46.38
		<hr/>
		59.02

Taxpayer does not agree with findings.

## Enclosures:

1943 return, Form 1040, Acct. No. NI-2509812  
 (Maryland)  
 with 1942 return, Form 1040 Unnumbered  
 and 1942 return, Form 1040 Acct. No. Nov.  
 800410 (6th Calif.)

DANIEL SAGOR,

DS:hg

Deputy Collector. [8]

## Recomputation of 1942 Tax

Lockheed Overseas Corporation (Domestic income only) Burbank, California.....	\$1,180.71
Lockheed Aircraft Corporation, Burbank, Calif.....	710.50
Bullock's Inc., Los Angeles, Calif.....	886.92
Total .....	2,778.13
Deductions .....	100.50
Balance .....	\$2,677.63
One-half to each spouse.....	\$1,338.82
Corrected net income .....	\$1,338.82
Less: Personal exemption .....	425.00
Credit for dependents .....	700.00
	1,125.00
Balance (surtax net income).....	\$ 213.82
Less: Earned income credit .....	133.88
Balance subject to normal tax.....	79.94
Normal tax .....	4.80
Surtax .....	27.80
Total 1942 tax .....	\$ 32.60

Received and filed Nov. 21, 1945. [9]

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition, except it is denied that the return for the period here involved was filed with the Collector for the Sixth District of California.
2. Admits the allegations contained in paragraph 2 of the petition.
3. Admits as alleged in paragraph 3 of the petition that the taxes in controversy are personal income taxes for the taxable year ending December 31, 1943; denies the remainder of the allegations contained in said paragraph. [10]
- 4(a). Denies the allegations of error contained in subdivision (a) of paragraph 4 of the petition.
- 5(a). Denies the allegations contained in the first, second and third paragraphs of subdivision (a) of paragraph 5 of the petition.
6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL ECC

Chief Counsel,

Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,

Division Counsel.

E. C. CROUTER,

A. J. HURLEY,

Special Attorneys,

Bureau of Internal Revenue.

AJR/vp 12/17/45

Received and filed Dec. 27, 1945. [11]

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The Tax Court of the United States

Docket Nos. 9643 and 9644

MICHAEL DOWNS AND

ELEANOR J. DOWNS,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

### STIPULATION OF FACTS

To the Tax Court of the United States:

It is hereby stipulated and agreed, by and between the parties hereto, by their respective coun-

sel, that the petitions of Michael Downs, Docket No. 9643 and Eleanor J. Downs, Docket No. 9644, may be consolidated and heard together, and that following facts shall be taken as true, without prejudice to the right of either party to introduce other and further evidence not inconsistent therewith:

1. From January 1 to June 30, 1942, petitioner Michael Downs was employed as an aircraft mechanic in the United States by Lockheed Aircraft Corporation and Lockheed Overseas Corporation, of Burbank, California.

2. On or about April 23, 1942, he made out and signed a formal application for overseas employment by Lockheed Overseas Corporation, a true and correct copy of which application is attached hereto and made a part hereof as Exhibit 1. In connection with such employment, petitioner in May of 1942, signed a contract [12] with Lockheed Overseas Corporation in which he agreed to perform services for that company at aircraft depots operated by it in the British Isles, a true and correct copy of which contract is attached hereto and made a part hereof as Exhibit 2.

3. Pursuant to his employment and said contract, Michael Downs, on June 30, 1942, embarked on His Majesty's Steamship Orangi, a vessel of British registry.

4. Pursuant to his employment and said contract above mentioned, the expiration date of said contract was extended by agreement of the parties to

it until May 1, 1943, at which time he entered into a new contract with Lockheed Overseas Corporation, a true and correct copy of which is attached hereto and made a part hereof as Exhibit 3. The petitioner Michael Downs remained in the employ of Lockheed Overseas Corporation stationed in the British Isles and Northern Ireland until July 12, 1944, at which time he returned to the United States and to the address where he now resides at 246 North Avenue 49, Los Angeles, California.

5. During the period of Michael Downs' absence from the United States, his wife, Eleanor J. Downs, remained in the United States with petitioners' three minor children and lived at the address just above mentioned.

6. Petitioner, Michael Downs, received as compensation for personal services rendered to Lockheed Overseas Corporation in the British Isles and Northern Ireland during the year 1943, the sum of \$5,438.50, of which 90% was deposited by said Lockheed Overseas Corporation to the account of the petitioner with the California Bank in Los Angeles pursuant to the provisions of the contract of employment. [13]

7. On October 9, 1944, petitioner Michael Downs filed an income tax return for the year 1943 with the Collector of Internal Revenue at Baltimore, Maryland, in which return the petitioner excluded from his gross income the aforesaid sum of \$5,438.50, on the ground that during the said year 1943 the petitioner was a bona fide resident of a



foreign country within the meaning of Section 116 of the Internal Revenue Code.

8. The petitioner did not at any time make any application to become a citizen of Northern Ireland or a British subject. During the year 1943, petitioner was domiciled in the United States.

/s/ ROBERT A. WARING,  
Counsel for Petitioners.

/s/ J. P. WENCHEL,                      ECC  
Chief Counsel, Bureau of  
Internal Revenue,  
Counsel for Respondent.

Filed June 20, 1946.



Occupation Best Qualified for, By Code No. 111 1. 70 2.

1 2 3

A B C

APPLICATION FOR FOREIGN SERVICE

NAME Michael Joseph CLOCK NO. 22109 OCCUP. CODE 717

PRINT LAST FIRST MIDDLE Joseph Michael

PRESENT ADDRESS 246 N. Ave 49 Los Angeles CITY Los Angeles PHONE ---

NUMBER STREET

Are you willing to go to any part of the world? yes For how long? 1 year ☐ 2 years ☐ Longer ☒

Do you understand your services may be in a war combat zone and travel to this point will be hazardous? yes

Do you understand you may not take your wife or any member of the family? yes

Name, address, telephone No., and relation of person to be notified in Emergency Cleaver J. Douns - 246 N. Ave 49 - L.A. My wife -

Will you submit to rigid medical examination? yes Inoculation? yes

Race Color of hair Color of eyes Height Weight Present age Length of residence in L.A. Co. What cities?

White - Brown - Blue - 5'6" - 41 - 1948 - 14 Los Angeles - 5 yrs. 4 months

Draft Classification None Local Board No. 196 City Los Angeles State Calif S.S. No. 562-95-6963

What military or naval experience? None Final Rating ---

What foreign languages do you speak and/or read? None

A and/or E License no Other C.A.A. Ratings none

What foreign country have you lived in? none For how long? ---

What special qualifications, Lockheed service, etc., have you? Lockman - sta - 586 - Fuel Assy - 4114 Bomber

Hydraulics and Plumbing, Electrical & Rigging - 14 months - Lockheed plant #1 -

18 yrs experience - Service Manager - Automobile Motors -

Understand every part # in plumbing - 4114 Bomber - as well as every operation

in plumbing - check my record,

Interviewed by Michael J. Douns Date 4-22-42

Signature of Applicant Michael J. Douns Date 4-24-42

# EXHIBIT 1





## EXHIBIT No. 2

## Secret

## Agreement of Employment

Agreement made this ..... day of ....., 1942, by and between Lockheed Overseas Corporation, a Delaware corporation with its principal place of business in Burbank, California, and (hereinafter sometimes referred to as Employee), an individual residing at .....

## Recitals

A. Pursuant to a certain Letter of Intent from the War Department of the United States of America (hereinafter sometimes referred to as the Government), Lockheed Aircraft Corporation, a California corporation with its principal place of business in Burbank, California, (herein called Lockheed), and the Government have entered into a contract for the organization, equipment, and operation of an aircraft depot outside the continental limits of the United States.

B. For the purpose of expediting the performance of such work, Lockheed Overseas Corporation, a wholly owned subsidiary of Lockheed, has accepted designation as major subcontractor under the above mentioned contract and has entered into a subcontract with Lockheed under which Lockheed Overseas Corporation has undertaken to organize, equip, and operate said aircraft depot. Said contract and subcontract (hereinafter for convenience referred to collectively as the Government contract)

are subject to extension of the term thereof and subject to termination by the Government under the terms and conditions therein set forth. The subsidiary, Lockheed Overseas Corporation, is hereinafter referred to as Contractor.

C. Contractor desires to employ Employee for work in connection with the organization, equipping, and operation of said aircraft depot; and Employee desires to accept such employment in accordance with the terms and conditions contained herein.

D. Employee understands that he may and probably will be called upon to render services hereunder in a war combat zone in a foreign country or countries under relatively difficult living and working conditions, and that travel of Employee may be subject to the dangers of war and travel by land, sea, and air.

### Agreement

In consideration of the premises, the mutual covenants and promises herein contained, and for other good and valuable considerations, the parties hereto agree as follows:

#### Article 1. Time and Duration of Employment

Contractor employs Employee to render service in connection with said aircraft depot with such duties as reasonably may be assigned to him, and Employee accepts such employment with knowledge of the conditions recited above. Subject to the terms and conditions hereinafter set forth, Employee's employment hereunder shall commence when he

reports for duty at a point [16] within the United States to be designated by Contractor, at the time and place designated by Contractor, and shall continue until November 1, 1942, or such later date as may be agreed upon and thereafter until sixty (60) days after return transportation to the United States is made available by Contractor, it being understood that such return transportation shall be made available on November 1, 1942, or the later date agreed upon or as soon thereafter as is practicable under the circumstances then existing.

## Article 2. Amount, Time and Mode of Payment of Salary

Employee's salary as long as he remains employed hereunder shall be at the rate of ..... dollars per month, lawful money of the United States (sometimes hereinafter referred to as foreign salary) payable semi-monthly, in United States Dollars except as hereinafter stated, provided however, that Employee's salary while employed hereunder in the United States shall be at the rate of sixty per cent (60%) of the foreign salary.

Unless otherwise approved by Contractor, the salary payable to Employee while employed hereunder outside of the United States (less any lawful deductions including any amounts paid to Employee by Contractor at Employee's place of duty), shall be deposited for the account and at the risk of Employee in a bank in the United States to be designated by Employee or, in the absence of such designation, in a member bank of the Federal Re-

serve System to be selected by Contractor, and a duplicate deposit slip or receipt of such bank shall constitute conclusive evidence of payment to Employee.

Contractor shall pay to Employee at his place of duty from time to time, amounts which shall not in the aggregate exceed during any one (1) month, ten per cent (10%) of Employee's salary for such month, payable in pounds sterling or United States dollars, at the sole discretion of the Contractor, but the foregoing provision of this sentence shall not apply while Employee is in the United States.

The Employee shall not seek reimbursement from the Contractor for any foreign exchange loss that he may incur in converting into Sterling United States money payable to him as compensation hereunder.

Prior to debarkation at the Point of entry, Contractors shall pay the Employee the sum of Fifty Dollars (\$50.00) as an advance against his salary, and the amount of such advance shall be immediately deducted from the salary payable to or for the account of Employee thereafter or from successive salary payments in such amounts as Contractor may deem expedient or advisable.

For each continuous period of six (6) consecutive months of employment hereunder outside of the United States Contractor shall pay to Employee, in addition to the salary to which Employee is otherwise entitled, the equivalent of one-half month's foreign salary and such additional salary shall not be in lieu of pay during such reasonable



vacation leave as may be authorized by Contractor. Vacations and sick leave policies will be governed by regulations prescribed by the Contractor at the site.

Because of the emergency nature of the work and the salary to be paid to Employee, there shall be no restriction (except such as may be imposed by the medical authorities having jurisdiction) upon the number of work hours per day or the number of work days per week. The salary and compensation herein provided for Employee being substantially in excess of that which Employee has been receiving or would have received for similar services rendered in the United States at the date hereof, includes compensation for any extra and overtime services to be performed, and Employee shall not be otherwise paid or compensated for services which would ordinarily be extra or overtime services.

Failure on the part of Contractor to respond to the precise time and mode of payment of salary prescribed herein shall not be considered as a breach or default on the part of Contractor in those cases in which such failure is the result of causes beyond Contractor's control.

### Article 3. Performance by Employee

Employee shall diligently and faithfully render such services and shall abide by all rules, regulations and requirements of Contractor, its officers, agents, and supervisory employees, as well as those of the United States Government and/or the War

Department, and all civil or military laws and regulations in effect from time to time at the place or places of duty hereunder during the continuance of and in connection with Employee's employment hereunder.

#### Article 4. Transportation

Employee consents to travel by rail, sea, and air, according to routes and by any mode of conveyance which Contractor may reasonably specify in reporting for and rendering services during employment and in traveling to and from the site.

When directed by Contractor, Employees shall return to the United States without delay by such route and means as Contractor may designate. Except as herein otherwise provided, Contractor shall furnish, cause to be furnished, or reimburse Employee for his reasonable disbursements for transportation, food, and accommodations from his present place of residence to the place of foreign duty and return to the extent that his travel is authorized or approved by Contractor.

#### Article 5. Passports and Preparation for Travel

This agreement is predicated upon satisfactory proof furnished by Employee that he is a citizen of the United States of America or Great Britain, and upon his ability to secure necessary passports, visas and such other permits as may be necessary to authorize his departure and absence from the United States, to pass such physical examination, and to submit to such disease immunization and

fingerprinting as may be required by proper authority or by Contractor.

If Employee is so qualified, Contractor shall obtain or cause to be obtained the necessary passports, travel permits and visas, for Employee without cost to him.

#### Article 6. Baggage and Property of Employee

Employee's personal baggage shall not exceed an amount to be specified by Contractor at the time of embarkation, and Contractor shall not be liable or responsible for any property of Employee or for loss or damage thereto in transit or elsewhere.

Employee shall comply with all custom and other laws and regulations of the countries from, to, or through which any of the Employee's property may be transported.

#### Article 7. Housing, Subsistence and Medical Services

During the time that Employee is employed hereunder and remains at the place or places of his duty outside of the United States, Contractor shall furnish or cause to be furnished, without cost to Employee, such adequate food, lodging, special clothing and equipment, medical, nursing, and hospital services and treatment and recreational facilities as circumstances may reasonably permit.

Employee shall submit prior to departure and from time to time during his employment to such vaccination, inoculation, and/or any other medical,

dental, surgical, nursing, and/or hospital treatment, preventative or curative, as the Contractor or other medical staff at the destination or elsewhere may from time to time specify, without expense to Employee.

Contractor may direct the return to the United States of Employee, if in Contractor's judgment Employee's health condition is unfavorable. [19]

#### Article 8. Compensation for Disability, Death, Capture, or Detention

A. (1) For the purpose of paying workmen's compensation benefits Contractor will voluntarily provide benefits as prescribed in the United States Longshoremen's and Harbor Worker's Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, and as extended by the Act of August 16, 1941 (Public Law No. 208—77th Congress), and such benefits shall be payable to Employee or his dependents as provided in said Act. In event the injury to Employee resulting in disability or death occurs at or about the place where Employee's services are being rendered, or during transportation to or from such place, such injury shall be presumed to have arisen out of and in the course of employment whether employee then actually was so engaged; provided, that no benefits shall be payable if the injury or death was occasioned solely by the intoxication of the Employee or by the willful intention of the Employee to injure or kill himself or another.

(2) Employee who is ascertained to be missing from his place of employment, whether or not such Employee then actually was engaged in the course of his employment, under circumstances supporting an inference that his absence may be due to the belligerent action of an enemy, or who is known to have been taken by an enemy as a prisoner, hostage, or otherwise, until such time as he is returned to his home, to the place of his employment, or is able to be returned to the jurisdiction of the United States, upon approval of Contractor and within the discretion of the Contracting officer who executed the prime contract with Contractor, or his duly authorized representative, shall be regarded solely for the purpose of this provision as deceased, and the benefits as are provided for death under the United States Longshoremen's and Harbor Worker's Compensation Act, approved March 4, 1927 (14 Stat. 1424), as amended, and as extended by the Act of August 16, 1941 (Public Law No. 208—77th Congress), shall be paid to his beneficiaries, as provided under this agreement, until such time as his return has been accomplished or he is able to be returned, or death in fact is established, or can be legally presumed to have occurred, and any payment made pursuant to this provision shall not in any case be included in computing the maximum aggregate or total payable compensation for death, as provided in the said Longshoremen's and Harbor Worker's Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, and as extended

by the Act of August 16, 1941 (Public Law No. 208—77th Congress).

(3) If Employee, or his dependents in the event of death, be awarded benefits under any workmen's compensation law of the United States or under the workmen's compensation law of any state, territory, possession or other jurisdiction for disability, death, capture or detention, Contractor shall pay the benefits so awarded by competent authority and such payments shall be in lieu of the voluntary benefits provided in subsections (1) and (2) of this section A. [20]

(4) If this agreement provides for payment of wages or salary of Employee during any period in which Employee or his beneficiaries would also be entitled to benefits under subsections (1), (2) or (3) of this section A, any benefits so payable hereunder for disability, death, capture or detention shall be a part of, and not in addition to, the wages or salary paid during such period pursuant to this agreement.

(5) Employee shall not be entitled to salary for any period during which he does not render services hereunder because of disability or captivity and detention, nor to receive disability benefits for any period during which he is entitled to receive benefits for captivity and detention.

#### Article 9. Taxes

Contractor shall either pay or reimburse Employee for any and all taxes lawfully levied or

assessed by any foreign Government against Employee with respect to his residence, occupation, salary, or income, provided, however, that Employee shall immediately notify Contractor in writing of any such levy or assessment and that Employee shall not pay any of such taxes as Contractor may direct him not to pay and that any claim for reimbursement shall be asserted in writing to Contractor within thirty (30) days after such payment, and provided further that Contractor shall save Employee harmless from any monetary loss resulting from or occasioned by Employee's failure to pay such taxes in compliance with instructions or directions given by Contractor.

#### Article 10. Tools

Contractor shall furnish or cause to be furnished tools and equipment for rendition of services hereunder by Employee, but such tools and equipment hereunder shall remain at all times the property of Contractor.

#### Article 11. Termination

A. Contractor may terminate Employee's and his right to receive further salary hereunder for any of the following causes:

(1) If the Contracting Officer representing the Government requires the dismissal of Employee as deemed by him to be necessary or advisable in the interests of the Government.

(2) If Contractor has reason to believe that Employee is not trustworthy, careful, or otherwise

qualified to render the services required hereunder.

(3) If Employee, in the opinion of the medical examiner or examiners designated by Contractor, is found to be afflicted with any venereal disease.

(4) If Employee violates any of the provisions of this agreement. [21]

(5) Completion by Contractor of its contract with the Government.

(6) Termination by the Government of its contract with the Contractor.

B. Under the terms of this article, Contractor shall not arbitrarily terminate Employee's employment and Contractor shall take into consideration all extenuating circumstances that may be involved except when required by the Contracting Officer to dismiss Employee as set forth in (A) (1) of this article.

C. In the event that the Employee terminates his employment hereunder voluntarily he shall not, unless otherwise approved by the Contractor, be entitled to return transportation to the United States or reimbursement therefor.

## Article 12. Military Information

This agreement includes, refers to, or incorporates classified military information within the scope of the law and regulations governing the safeguarding of military information. Employee shall comply with the requirements of the pertinent regulations, particularly paragraphs 53 and 60 of Army Regulations No. 380-5, June 18, 1941, as



they may be amended or supplemented from time to time, and with any special instructions which may be issued pursuant thereto, and shall not publish, divulge, or sell anything which includes, refers to, or incorporates such classified military information without specific authority therefor from the Government. Employees shall not at any time subsequent to entering into this agreement, without the prior written consent of Contractor and the Government as represented by the War Department, publish or cause to be published in any manner or by any means, either by statements, photographs, pictures, books, articles, reports, charts, graphs, maps, or otherwise, written, pictorial, or oral, directly or indirectly relating to this agreement, the Government contract, his employment hereunder, or any other matters relating to the organization, equipping, or operation of said aircraft depot. The provisions of this paragraph may be enforced by injunctive relief and by any other applicable legal remedies.

### Article 13. Disputes

Except as otherwise specifically provided in this agreement, all disputes between Contractor and Employee concerning questions of fact arising under this contract shall be decided by the Contracting Officer who executed the Government Contract or his duly authorized representative or successor (or, if there then be no Contracting Officer, by such person, if any, as may be designated by the Secretary of War for the purpose) subject to writ-

ten appeal by either party within thirty (30) days to said Secretary of War or his duly authorized representative, whose decision shall be final and conclusive upon the parties hereto. [22]

#### Article 14. Employee's Work Record

Before Employee returns from the foreign site, Contractor shall make in duplicate a record of his employment stating the circumstances under which Employee is returning, upon which Employee shall set forth the nature, extent and the amount of all claims of Employee against the Contractor under or arising out of this contract or his employment hereunder. Both copies of this record shall be signed by Contractor and Employee and one copy of this record shall be given to Employee who shall present same to Contractor upon his return to continental United States. No claims of any nature shall be recognized nor shall Employee be entitled to payment of any compensation, benefits or other sums whatever except upon the presentation of such record of employment and in accordance with the entries therein contained. Should such record of employment be lost or Employee be unable for any other reason to present the same upon his return, Contractor shall, as promptly as circumstances permit, obtain a duplicate of such record from the field office at the foreign site of the work and any claims which Employee may have will be adjusted promptly upon receipt of such duplicate, but not otherwise.

## Article 15. Miscellaneous

This agreement shall be construed and interpreted solely in accordance with the laws of the State of California, may not be assigned by either party without the written consent of the other party, constitutes the entire agreement between the parties hereto relating to the subject matter hereof, and shall not be binding until executed by an officer of the Contractor at its office in the City of Burbank, California.

## Article 16. Headings

The headings of the various articles of this contract are for convenience and reference only and are not to be read or construed as a part of the contract.

In Witness Whereof Contractor has caused this agreement to be executed in duplicate in the City of Burbank, State of California, by its officer thereunto duly authorized and its corporate seal to be affixed hereto, and Employee has executed the same, in duplicate, the day and year first above written.

[Seal]

LOCKHEED OVERSEAS  
CORPORATION,

By .....

President.

Witness to signature of Employee

.....  
.....

Employee. [23]

## Extension of Agreement of Employment

In accordance with Article I of the Employment Agreement heretofore entered into between Lockheed Overseas Corporation, a Delaware corporation, and the undersigned Employee, it is hereby agreed that the later date provided for in said Article I shall be May 1, 1943.

All other provisions of said Agreement shall remain in full force and effect except that part of Article II relating to the monthly rate of pay which is hereby changed to read from \$..... to \$.....

LOCKHEED OVERSEAS  
CORPORATION,

By .....

.....

Employee.

Date: ..... [24]

## EXHIBIT No. 3

## SECRET

## Agreement of Employment

Agreement made this 7th day of April, 1943 by and between Lockheed Overseas Corporation, a Delaware corporation with its principal place of business in Burbank, California, and First Name, Initial, Last Name (hereinafter sometimes referred to as Employee), an individual residing at.....

## Recitals

A. The United States of America (hereinafter sometimes referred to as the Government) and Lockheed Aircraft Corporation, a California corporation with its principal place of business in Burbank, California, (herein called Lockheed) have entered into a contract for the organization, equipment and operation of an aircraft depot outside the continental limits of the United States, the term of which contract has been extended by exchange of letters and may be hereafter further extended.

B. For the purpose of expediting the performance of such work, Lockheed Overseas Corporation, a wholly owned subsidiary of Lockheed, has accepted designation as major subcontractor under the above mentioned contract and has entered into a subcontract with Lockheed under which Lockheed Overseas Corporation has undertaken to organize, equip and operate said aircraft depot. Said contract and subcontract (hereinafter for convenience

referred to collectively as the Government contract) are subject to extension of the term thereof and subject to termination by the Government under the terms and conditions therein set forth. The subsidiary, Lockheed Overseas Corporation, is herein-after referred to as Contractor.

C. Contractor desires to employ Employee for work in connection with the operation of said aircraft depot; and Employee desires to accept such employment in accordance with the terms and conditions contained herein.

D. Employee understands that he will probably be called upon to render services hereunder in a war combat zone in a foreign country or countries under relatively difficult living and working conditions, that he may be serving in the field with the armed forces of the United States or one or more of the United Nations and may be subject to military law and military discipline and that travel of Employee will be subject to the dangers of war and travel by land, sea and air. [25]

### Agreement

In consideration of the premises, the mutual covenants and promises herein contained, and for other good and valuable considerations, the parties hereto agree as follows:

#### Article 1. Time and Duration of Employment

Contractor employs Employee to render services in connection with said aircraft depot with such duties as reasonably may be assigned to him, and Employee accepts such employment with knowledge

of the conditions recited above. The term of Employee's employment hereunder shall commence either

- (a) on May 1, 1943, if Employee shall, immediately prior to May 1, 1943, have been in the employ of Contractor under any other contract; or
- (b) on the date when Employee reports for duty at the time and place within the United States designed by Contractor, if Employee shall enter the employ of Contractor under this contract;

and shall continue, subject to the terms and conditions hereinafter set forth, for (i) the duration of the contract between the Government and Lockheed as from time to time extended and for such period after the termination or completion of said contract as Contractor may, in respect of such Employee, deem necessary for the winding up of the operations carried on under said contract after such termination or completion; and (ii) thereafter until return transportation to the United States for such Employee is made available by Contractor or by the Government to Contractor which transportation Contractor shall use its best efforts to obtain as promptly after the end of the period described in the foregoing clause (i) as is practicable under the circumstances then existing; and (iii) with respect to any Employee who has faithfully performed his duties and obligations hereunder throughout the term provided in the fore-

going clauses (i) and (ii) or whose employment has been terminated hereunder through no fault of the Employee under Paragraph B of Article 11 hereof, for a period of sixty (60) days after such transportation is made available; provided, however, that with respect to the sixty (60) day period provided in clause three, any employee who shall during such period enter into any other employment, including the service of the Government, shall be deemed thereby to have voluntarily terminated his employment hereunder, and any employees who shall enter into such other employment shall throughout such period perform such services as may be required of him by the Contractor.

## Article 2. Amount, Time and Mode of Payment of Salary

Employee's salary as long as he remains employed hereunder shall be at the rate of (present rate) dollars per month lawful money of the United States (sometimes hereinafter referred to as foreign salary) payable monthly, in United States dollars except as hereinafter stated, provided, however, that Employee's salary [26] while employed hereunder in the United States shall be at the rate of sixty per cent (60%) of the foreign salary.

Unless otherwise approved by Contractor, the salary payable to Employee while employed hereunder outside of the United States (less any lawful deductions including any amounts paid to Employee by Contractor at Employee's place of duty) shall be deposited for the account and at the risk of Em-



ployee in a bank in the United States to be designated by Employee or, in the absence of such designation, in a member bank of the Federal Reserve System to be selected by Contractor, and a duplicate deposit slip or receipt of such bank shall constitute conclusive evidence of payment to Employee.

Contractor shall pay to Employee at his place of duty from time to time, amounts which shall not in the aggregate exceed during any one (1) month, ten per cent (10%) of Employee's salary for such month, payable in the currency of the country in which he is located or in United States dollars, at the sole discretion of the Contractor, but the foregoing provision of this sentence shall not apply while Employee is in the United States.

The Employee will not seek reimbursement from the Contractor for any foreign exchange loss.

Prior to debarkation at the point of entry, Contractor shall pay the Employee the sum of Fifty Dollars (\$50.00) as an advance against his salary, and the amount of such advance shall be immediately deducted from the salary payable to or for the account of Employee thereafter or from successive salary payments in such amounts as Contractor may deem expedient or advisable.

For each continuous period of six (6) consecutive months of employment outside of the United States under this agreement, or under this and the previous agreement, between Contractor and employee covering services in connection with the Government contract, Contractor shall pay to Employee

in addition to the salary to which Employee is otherwise entitled, the equivalent of one-half month's foreign salary, and such additional salary shall not be in lieu of pay during such reasonable vacation leave as may be authorized by Contractor. Vacations and sick leave policies will be governed by regulations prescribed by the Contractor.

Because of the emergency nature of the work and the salary to be paid to Employee, there shall be no restriction (except such as may be imposed by the medical authorities having jurisdiction) upon the number of work hours per day or the number of work days per week. The salary and compensation herein provided for Employee being substantially in excess of that which Employee has been receiving or would have received for similar services rendered in the United States at the date hereof, includes compensation for any extra and overtime services to be performed, and Employee shall not be otherwise paid or compensated for services which would ordinarily be extra or overtime services.

Failure on the part of the Contractor to respond to the precise time and mode of payment of salary prescribed herein shall [27] not be considered as a breach or default on the part of the Contractor in those cases in which such failure is the result of causes beyond Contractor's control.

### Article 3. Performance by Employee

Employee shall throughout entire term of his employment hereunder, as hereinbefore provided, diligently and faithfully perform the services and

duties required of him hereunder, and shall abide by all rules, regulations and requirements of Contractor, its officers, agents, and supervisory employees, as well as those of the United States Government and/or War Department, and all civil or military laws and regulations in effect from time to time at the place or places of duty hereunder.

#### Article 4. Transportation

Employee consents to travel by land, sea and air, according to routes and by any mode of conveyance which Contractor may reasonably specify in reporting for and rendering services during employment and in traveling to and from the site.

When directed by Contractor, Employee shall return to the United States without delay by such route and means as Contractor may designate. Except as herein otherwise provided, Contractor shall furnish, cause to be furnished, or reimburse Employee for his reasonable disbursements for transportation, food, and accommodations from his present place of residence to the place of foreign duty and return to the extent that his travel is authorized or approved by Contractor.

#### Article 5. Passports and Preparation for Travel

This agreement is predicated upon satisfactory proof furnished by Employee that he is a citizen of the United States of America or Great Britain, and upon his ability to secure necessary passports, visas and such other permits as may be necessary to authorize his departure and absence from the United States, to pass such physical examination,

and to submit to such disease immunization and fingerprinting as may be required by proper authority or by Contractor.

If Employee is so qualified, Contractor shall obtain or cause to be obtained the necessary passports, travel permits and visas, for Employee without cost to him.

#### Article 6. Baggage and Property of Employee

Employee's personal baggage shall not exceed an amount to be specified by Contractor at the time of embarkation, and Contractor shall not be liable or responsible for any property of Employee or for loss or damage thereto in transit or elsewhere.

Employee shall comply with all custom and other laws and regulations of the countries from, to, or through which any of the Employee's property may be transported. [28]

#### Article 7. Housing, Subsistence and Medical Services

During the time that Employee is employed hereunder at any place or places outside of the United States, Contractor shall furnish or cause to be furnished without cost to Employee, such adequate food, lodging, special clothing and equipment, medical, nursing, and hospital services and treatment and recreational facilities as circumstances may reasonably permit.

Prior to departure from the United States, Employee shall submit to such physical examination, vaccination and inoculation as the Contractor shall direct at no expense to Employee. Thereafter Em-

ployee shall from time to time during the term of his employment submit to such further examination, vaccination, inoculation and other medical, dental, surgical, nursing and/or hospital treatment, preventative or curative as Contractor's or such other medical staff as may be specified by Contractor may from time to time require or deem necessary or desirable.

**Article 8. Compensation for Disability, Death,  
Capture or Detention**

A. (1) For the purpose of paying workmen's compensation benefits Contractor will provide benefits as prescribed in the United States Longshoremen's and Harbor Worker's Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, and as extended by the Act of August 16, 1941 (Public Law No. 208—77th Congress), and such benefits shall be payable to Employee or his dependents as provided in said Act. In event the injury to Employee resulting in disability or death occurs at or about the place where Employee's services are being rendered, or during transportation to or from such place, such injury shall be presumed to have arisen out of and in the course of employment whether employee then actually was so engaged; provided, that no benefits shall be payable if the injury or death was occasioned solely by the intoxication of the Employee or by the willful intention of the Employee to injure or kill himself or another.

(2) Employee who is ascertained to be missing

from his place of employment, whether or not such Employee then actually was engaged in the course of his employment, under circumstances supporting an inference that his absence may be due to the belligerent action of an enemy, or who is known to have been taken by an enemy as a prisoner, hostage, or otherwise, until such time as he is returned to his home, to the place of his employment, or is able to be returned to the jurisdiction of the United States, upon approval of Contractor and within the discretion of the Contracting Officer who executed the Government contract, or his duly authorized representative, shall be regarded solely for the purposes of this provision as deceased, and the benefits as are provided for death under the United States Longshoremen's and Harbor Worker's Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, and as extended by the Act of August 16, 1941 (Public Law No. 208—77th Congress), shall be [29] paid to his beneficiaries, as provided under this agreement, until such time as his return has been accomplished or he is able to be returned, or death in fact is established, or can be legally presumed to have occurred, and any payment made pursuant to this provision shall not in any case be included in computing the maximum aggregate or total payable compensation for death, as provided in the said Longshoremen's and Harbor Worker's Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, and as extended by the Act of August 16, 1941 (Public Law No. 208—77th Congress).

(3) If Employee, or his dependents in the event of death, be awarded benefits under any workmen's compensation law of the United States or under the workmen's compensation law of any state, territory, possession or other jurisdiction for disability, death, capture or detention, Contractor shall pay the benefits so awarded by competent authority and such payments shall be in lieu of the benefits provided in subsections (1) and (2) of this Section A.

(4) If this agreement provides for payment of wages or salary of Employee during any period in which Employee or his beneficiaries would also be entitled to benefits under subsections (1), (2) or (3) or this Section A, any benefits so payable hereunder for disability, death, capture or detention shall be a part of, and not in addition to, the wages or salary paid during such period pursuant to this agreement.

(5) Employee shall not be entitled to salary for any period during which he does not render services hereunder because of captivity and detention, nor to receive disability benefits for any period during which he is entitled to receive benefits for captivity and detention.

#### Article 9. Taxes

Contractor shall either pay or reimburse Employee for any and all taxes lawfully levied or assessed by any foreign Government against Employee with respect to his residence, occupation, salary, or income, provided, however, that Employee shall immediately notify Contractor in writing of any

such levy or assessment and that Employee shall not pay any of such taxes as Contractor may direct him not to pay and that any claim for reimbursement shall be asserted in writing to Contractor within thirty (30) days after such payment, and provided further that Contractor shall save Employee harmless from any monetary loss resulting from or occasioned by Employee's failure to pay such taxes in compliance with instructions or directions given by Contractor.

#### Article 10. Tools

Contractor shall furnish or cause to be furnished tools and equipment for rendition of services hereunder by Employee, but such tools and equipment hereunder shall remain at all times the property of the Contractor. [30]

#### Article 11. Termination

A. Contractor may terminate Employee's employment and his right to receive further salary hereunder for any of the following causes:

- (1) If the Contracting Officer representing the Government requires the dismissal of Employee as deemed by him to be necessary or advisable in the interests of the Government.
- (2) If Contractor has reason to believe that Employee is not trustworthy, careful, or is otherwise disqualified to render the services required hereunder.
- (3) If Employee, in the opinion of the medical examiner or examiners designated by Con-



tractor, is found to be afflicted with any venereal disease.

- (4) If Employee violates any of the provisions of this agreement or fails faithfully and diligently to perform the services and duties required of him hereunder.

Upon termination by the Contractor under this Paragraph A, the Contractor may in its discretion, but shall not be required to, make available to Employee return transportation to the United States but shall have no obligation to pay Employee any salary for any period from and after such termination.

B. Contractor may further terminate Employee's employment without cause under the following circumstances:

- (1) Upon or after the completion of the Government contract.
- (2) Upon or after termination by the Government of the Government contract.
- (3) If, in the opinion of the Contractor, the health or physical condition of Employee is such as to render further services by Employee hereunder undesirable.

In the event of termination by the Contractor under this Paragraph B of Article 11, Contractor shall make available to Employee return transportation to the United States and Employee shall be entitled to receive salary as provided in Article 2 hereof until such return transportation is made available

and for the period of sixty (60) days thereafter, as provided in said Article 1.

C. In the event that Employee terminates his employment hereunder voluntarily, he shall not from and after such termination be entitled to any salary hereunder or, unless otherwise approved by Contractor, to return transportation to the United States or reimbursement therefor. [31]

D. Contractor shall not arbitrarily terminate Employee's employment under Paragraph A of this Article and shall take into consideration in connection with any such termination all extenuating circumstances which may be involved, except when required by the Contracting Officer to terminate Employee's employment pursuant to sub-paragraph (1) of Paragraph A.

## Article 12. Military Information

This agreement includes, refers to, or incorporates classified military information within the scope of the laws and regulations governing the safeguarding of military information. Employee shall comply with the requirements of the pertinent regulations, particularly Paragraphs 53 and 60 of Army Regulations No. 380-5, June 18, 1941, as they may be amended or supplemented from time to time, and with any special instructions which may be issued pursuant thereto, and shall not publish, divulge, or sell anything which includes, refers to, or incorporates such classified military information without specific authority therefor from the Gov-

ernment. Employee shall not at any time subsequent to entering into this agreement, without the prior written consent of Contractor and the Government as represented by the War Department, publish or cause to be published in any manner or by any means, either by statements, photographs, pictures, books, articles, reports, charts, graphs, maps, or otherwise, written, pictorial, or oral, directly or indirectly relating to this agreement, the Government contract, his employment hereunder, or any other matters relating to the organization, equipping, or operation of said aircraft depot. The provisions of this paragraph may be enforced by injunctive relief and by any other applicable legal remedies.

### Article 13. Employee's Work Record

Before Employee returns from the foreign site, Contractor shall make in duplicate a record of his employment stating the circumstances under which Employee is returning, upon which Employee shall set forth the nature, extent and the amount of all claims of Employee against the Contractor under or arising out of this contract or his employment hereunder. Both copies of this record shall be signed by Contractor and Employee and one copy of this record shall be given to Employee who shall present same to Contractor upon his return to continental United States. No claims of any nature shall be recognized nor shall Employee be entitled to payment of any compensation, benefits or other sums whatever except upon the presentation of such

record of employment and in accordance with the entries therein contained. Should such record of employment be lost or Employee be unable for any other reason to present the same upon his return, Contractor shall, as promptly as circumstances permit, obtain a duplicate of such record from the field office at the foreign site of the work and any claims which Employee may have will be adjusted promptly upon receipt of such duplicate, but not otherwise. [32]

#### Article 14. Miscellaneous

This agreement shall be construed and interpreted solely in accordance with the laws of the State of California, may not be assigned by either party without the written consent of the other party, constitutes the entire agreement between the parties hereto relating to the subject matter hereof, and shall not be binding until executed by an officer of the Contractor at its office in the City of Burbank, State of California.

#### Article 15. Headings

The headings of the various articles of this contract are for convenience and reference only and are not to be read or construed as a part of the contract.

In Witness Whereof Contractor has caused this agreement to be executed in duplicate in the City of Burbank, State of California, by its officer thereunto duly authorized and its corporate seal to be

affixed hereto, and Employee has executed the same, in duplicate, the day and year first above written.

[Seal]

LOCKHEED OVERSEAS  
CORPORATION,

By .....  
President.

Witness to signature of Employee:

.....  
Interviewer Signature.

.....  
Employee. [33]

Filed: T.C.U.S., June 20, 1946.

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The Tax Court of the United States

7 T. C. No. 123

MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

ELEANOR J. DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

Docket Nos. 9643, 9644

Promulgated October 24, 1946.

1. The petitioner, Michael Downs, a citizen of

the United States went to the British Isles in 1942 as an employee of Lockheed Overseas Corporation to do mechanical work important and essential to the war effort. He landed in the British Isles in July 1942 and remained there until July 1944, when he returned to the United States. After disembarking in July 1942, petitioner was first assigned to an R. A. F. base near Liverpool, England in the capacity of a field and service mechanic. Later he was transferred to Ireland for a short time after which he was moved from time to time to different air bases in England and Ireland. Held, on the facts that petitioner Michael Downs was not during 1943, a "bona fide resident of a foreign country or countries" within the meaning of section 116 of the Internal Revenue Code as amended by section 148 (a) of the Revenue Act of 1942 and the salary which he received from Lockheed is not exempt from taxation. Arthur J. H. Johnson, 7 T. C....., followed. [34]

2. The Commissioner has determined that the salary received in 1943 by Michael Downs from Lockheed was community property under the laws of California between him and his wife, petitioner Eleanor J. Downs, and has determined a deficiency against Eleanor. Because she did not file an income tax return for the year 1943, the Commissioner has added a 25 percent delinquency penalty against her for failure to file a return. In her petition Eleanor did not assign as error the action of the

Commissioner in imposing the penalty and no evidence was offered that failure to file a return for her for 1943 was due to reasonable cause and not willful neglect. Held, the Commissioner is sustained in imposing the penalty under section 3612(d)(1), Internal Revenue Code.

ROBERT A. WARING, Esq.,

For the Petitioners,

A. J. HURLEY, Esq.,

For the Respondent.

The Commissioner has determined a deficiency in income tax against Michael Downs, petitioner in Docket No. 9643 of \$225.79 for the year 1943 and he has determined a similar deficiency against Eleanor J. Downs, wife of Michael, petitioner in Docket No. 9644 for the same year of \$219.52, plus delinquency penalty of 25 percent, amounting to \$54.88. In the deficiency notice addressed to petitioner Michael Downs it was stated:

Taxpayer has not established that he was "a bona fide resident of a foreign country or countries" within the meaning of Section 116 of the Internal Revenue Code. The amounts shown below are therefore restored to income, as community income, and the tax for 1943 determined as indicated.

A statement to the same effect was made in the deficiency notice addressed to Eleanor J. Downs. Both petitioners, by appropriate assignments of

error, contest the correctness of the Commissioner's foregoing determination.

The proceedings have been consolidated.

Some of the facts have been stipulated. [35]

### FINDINGS OF FACT

The stipulated facts are hereby found accordingly.

Petitioners Michael Downs and Eleanor J. Downs are husband and wife, citizens of the United States, residing in Los Angeles, California. Petitioner Michael Downs timely filed an income tax return for the taxable year 1943 with the Collector of Internal Revenue for the District of Maryland. Petitioner Eleanor J. Downs filed no return for the taxable year 1943. When the word "petitioner" is used hereafter it will generally refer to Michael Downs.

Early in 1942 Lockheed Aircraft Corporation entered into a contract with the United States Government in which the corporation agreed to organize, equip and operate an aircraft depot in Northern Ireland in connection with the war effort. The project was designated by the United States Army as operation "Magnet." In connection with the operation it was necessary for Lockheed Aircraft Corporation and its wholly owned subsidiary, Lockheed Overseas Corporation, sometimes hereafter referred to as Lockheed, to employ large numbers of skilled men in the United States and transport them to the British Isles. It was estimated that some



5,400 American citizens at one time or another, counting those who came over and returned before the completion of the job, were employed by Lockheed at the aircraft depot in Northern Ireland.

From January 1 to June 30, 1942, petitioner was employed as an aircraft mechanic in the United States by Lockheed Aircraft Corporation at Burbank, California. [36]

On or about April 23, 1942, petitioner made out and signed a formal application for overseas employment with Lockheed and in connection with such application signed a contract shortly thereafter with the corporation in which he agreed to perform services for the company at an aircraft depot to be operated by it in the British Isles. The application which petitioner signed for employment with Lockheed was headed: "Application for Foreign Service." The application contained the following question:

Are you willing to go to any part of the world?    Yes.

For how long?    1 year    2 years    Longer X.

Petitioner in his application for foreign service thus indicated a willingness to serve as an employee of Lockheed overseas for more than two years, if necessary. The contract which petitioner signed provided inter alia as follows:

**Article 1. Time and Duration of Employment**

Contractor employs Employee to render services in connection with said aircraft depot with such duties as reasonably may be assigned

to him, and Employee accepts such employment with knowledge of the conditions recited above. Subject to the terms and conditions hereinafter set forth, Employee's employment hereunder shall commence when he reports for duty at a point within the United States to be designated by Contractor, at the time and place designated by Contractor, and shall continue until November 1, 1942, or such later date as may be agreed upon and thereafter until sixty (60) days after return transportation to the United States is made available by Contractor, it being understood that such return transportation shall be available on November 1, 1942, or the later date agreed upon or as soon thereafter as is practicable under the circumstances then existing.

#### Article 7. Housing, Subsistence and Medical Services

During the time that Employee is employed hereunder and remains at the place or places of his duty outside of the United States, Contractor shall furnish or cause to be furnished, without cost to Employee, such adequate food, lodging, special clothing and equipment, medical, nursing, and hospital services and treatment and recreational facilities as circumstances may reasonably permit.

Employee shall submit prior to departure and from time to time during his employment to such vaccination, inoculation, and/or any other medical, dental, surgical, nursing, and/or

hospital treatment, preventative or curative, as the Contractor or other medical staff at the destination or elsewhere may from time to time specify, without expense to employee.

Contractor may direct the return to the United States of Employee, if in Contractor's judgment Employee's health condition is unfavorable.

#### Article 9. Taxes

Contractor shall either pay or reimburse Employee for any and all taxes lawfully levied or assessed by any foreign Government against Employee with respect to his residence, occupation, salary, or income, provided, however, that Employee shall immediately notify Contractor in writing of any such levy or assessment and that Employee shall not pay any of such taxes as Contractor may direct him not to pay and that any claim for reimbursement shall be asserted in writing to Contractor within thirty (30) days after such payment, and provided further that Contractor shall save Employee harmless from any monetary loss resulting from or occasioned by Employee's failure to pay such taxes in compliance with instructions or directions given by Contractor.

Pursuant to the terms of his contract, petitioner left the United States for the British Isles on June 30, 1942 and landed several weeks later in Glasgow, Scotland. [38]

Petitioner was admitted to the British Isles on a visa as an employee of Lockheed. This visa, under British law, had to be put in use within three months from the date it was issued but the time that the holder would be allowed to stay is not mentioned therein. The visa, under British law, would permit him to remain for the purpose for which it was given, as an employee of Lockheed, and if and when Lockheed terminated its work over there, petitioner would be expected to depart within a reasonable time when transport was available and subject to any extensions that might be given him by the home office in London or local authorities in Belfast.

After disembarking petitioner was first assigned to an R. A. F. base near Liverpool, England, in the capacity of a field and service mechanic. Later he was transferred to Ireland for a short time after which he was moved from time to time to different air bases in England and Ireland where he performed essential services for the British Air Force, the American Air Force and the Polish Air Force, always as an employee of Lockheed.

The expiration date of petitioner's contract was extended by agreement of the parties until May 1, 1943, at which time he entered into a new contract with Lockheed. This new contract provided, *inter alia*, as follows:

Article 1. Time and Duration of  
Employment

Contractor employs Employee to render services in connection with said aircraft depot with such duties as reasonably may be assigned

to him, and Employee accepts such employment with knowledge of the conditions recited above. The term of Employee's employment hereunder shall \* \* \*

\* \* \* continue, subject to the terms and conditions hereinafter set forth, for (i) the duration of the contract between the Government and Lockheed as from time to time extended and for such period after the termination or completion of said contract as Contractor may, in respect of such Employee, deem necessary for the winding up of the operations carried on under said contract after such termination or completion; and (ii) thereafter until return transportation to the United States for such Employee is made available by Contractor or by the Government to Contractor which transportation Contractor shall use its best efforts to obtain as promptly after the end of the period described in the foregoing clause (i) as is practicable under the circumstances then existing; \* \* \*

The petitioner remained in the employ of Lockheed stationed in the British Isles and Northern Ireland until July 12, 1944, when he returned to the United States and to the address where he now resides in Los Angeles, California. During the period of petitioner's absence from the United States, his wife Eleanor remained in the United States with petitioner's three minor children and lived at the family residence in Los Angeles.

Petitioner received as compensation for personal

services rendered to Lockheed in the British Isles and Northern Ireland during the year 1943 the sum of \$5,438.50 of which 90 percent was deposited by the corporation to the account of the petitioner with the California Bank in Los Angeles pursuant to Article 2 of his employment contract.

Petitioner did not at any time make application to become a citizen of Northern Ireland or a British subject. During the taxable year 1943 he was domiciled in the United States and intended to return to this country as soon as the war in Europe was over. He did not pay any income taxes to the Government of Northern Ireland or the United Kingdom of Great Britain for the year 1943. [40]

On October 9, 1944, petitioner Michael Downs filed an income tax return for the year 1943 with the Collector of Internal Revenue at Baltimore, Maryland, in which return he excluded from his gross income the aforesaid sum of \$5,438.50 on the ground that during the entire year of 1943 he was a bona fide resident of a foreign country within the meaning of section 116 of the Internal Revenue Code.

Any of the stipulated facts not embodied in the foregoing findings are incorporated herein by reference.

### OPINION

Black, Judge: There is but one issue in these consolidated proceedings and that is whether the \$5,438.50 which the petitioner earned in 1943 while an employee of Lockheed Overseas Corporation is

exempt from taxation under the provisions of section 116, I.R.C., printed in the margin.<sup>1</sup>

There is no dispute as to the underlying facts in the instant case. The only dispute is as to the ultimate fact. Petitioner contends that on the facts which have been stipulated, and those proved at the hearing, we should find that during the entire year 1943 he was a "bona fide resident of a foreign country or countries" within the meaning of section 116 I.R.C. Respondent asks us to find on these same facts that petitioner was not a "bona fide resident of a foreign country or countries" during the period in question.

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<sup>1</sup>Sec. 116. Exclusions from Gross Income.

In addition to the items specified in section 22(b) the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) **Earned Income From Sources Without the United States.—**

(1) **Foreign resident for entire taxable year.**—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25(a) if received from sources within the United States; but such individuals shall not be allowed as a deduction from his gross income any deduction properly allocable to or chargeable against amounts excluded from gross income under this subsection.

In the consideration of the issue we have here to decide, certain things are clear. When petitioner went overseas in 1942 he had no intention of changing his domicile. At all times material hereto petitioner's domicile was in the United States. He concedes that. We agree with petitioner that the fact that at no time material hereto did he have any intention of changing his domicile is not decisive of the question we have here to decide. It is also clear that petitioner was physically absent from the United States during the entire taxable year 1943, and during this time he was engaged in important and essential work in the war effort as an employee of Lockheed at the aircraft depot established in Northern Ireland and elsewhere in the British Isles. Both parties seem to agree in their briefs that there are many and varied definitions of the word "residence" to be found in adjudicated cases in the law books not having to do with income taxes, and that these definitions are of little help in deciding the issue which we have here. They are in agreement that inasmuch as section 116 I.R.C. does not define the meaning of "bona fide residence of a foreign country or countries" that the Treasury Regulations must be looked to to find the correct interpretation of the words thus used in the statute. [42] Both parties seem to agree that the applicable regulations are those printed in the margin.<sup>2</sup> The legislative his-

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<sup>2</sup>Regulations 111.

Sec. 29.116-1. Earned Income From Sources Without the United States.—For taxable years beginning after December 31, 1942, there is excluded from gross income earned income in the case of an individual citizen of the United States provided the



tory of section 116 I.R.C. printed in footnote 1 has been fully discussed in Arthur J. H. Johnson, 7 T.C. . . . , this day decided. Also Treasury Regulations 111, sections 29.116-1 and 29.211-2 printed in margin 2 were analyzed and discussed in [43] that case. We shall not repeat that legislative history and discussion here. In the Johnson case we held on the facts present therein that the taxpayer was not during 1943 a bona fide resident of a "foreign country or countries" within the meaning of section 116 I.R.C. On authority of that case, we think we must make the same holding here. It is true, of course, that there are some differences in the facts of the Johnson case from those of the instant case, but we do not think those differences are sufficient

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following conditions are met by the taxpayer claiming such exclusion from his gross income: (a) It is established to the satisfaction of the Commissioner that the taxpayer has been a bona fide resident of a foreign country or countries throughout the entire taxable years; (b) such income is from sources without the United States; (c) the income constitutes earned income as defined in section 25(a) if received from sources within the United States; and (d) such income does not represent amounts paid by the United States or any agency or instrumentality thereof. \* \* \* Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principles of sections 29.211-2, 29.211-3, 29.211-4, and 29.211-5 relating to what constitutes residence or nonresidence, as the case may be, in the United States in the case of an alien individual.

\* \* \*

Sec. 29.211-2. Definition.—

\* \* \*

An alien actually present in the United States

to make the cases distinguishable as to the result reached.

Petitioner in arguing that during 1943 he was a "bona fide" resident of a foreign country or countries within the meaning of section 116, says in his brief:

These two Latin words "bona fide" mean acting in "good faith." These words were wisely designed to prevent persons not acting in good faith from traveling out of the country just to avoid taxes thereby—taking a trip perhaps at the expense of the government. The

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who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

purpose was to prevent persons acting in bad faith from tax avoidance by false claims.

The good faith of Michael Downs surely cannot be seriously questioned by the Commissioner. \* \* \*

We agree that the good faith of petitioner in going overseas as an employee of Lockheed, and rendering important and essential services to the war effort cannot be questioned. We do not understand that it is being questioned by the Commissioner. The Commissioner states in his brief that his attitude in this sort of cases is correctly stated in I.T. 3642, Cum. Bull. 1944, page 262. In that I.T. advice was requested whether A, a citizen of the United States who went to Canada on January 1, 1943, where he was employed on a war project during the entire year 1943, and who intended to remain in Canada until May, 1944, was entitled under section 116(a)(1) I.R.C. [44] as amended by section 148(a) of the Revenue Act of 1942, to exclude from gross income for Federal income tax purposes for the taxable year 1943 the compensation received by him for personal services rendered in Canada during that year. The answer to the advice requested was stated in the I.T. as follows:

In determining whether a citizen of the United States is a bona fide resident of a foreign country or countries within the meaning of section 116(a)(1) of the Code, \* \* \* the tests generally applicable will be those used in ascertaining whether an alien is a resident of the

United States. \* \* \* Mere physical presence in a foreign country or countries during the entire taxable year is not of itself sufficient to constitute a citizen of the United States a bona fide resident of such country or countries for the purpose of section 116(a)(1) of the Code. The burden of proof is on the taxpayer to establish to the satisfaction of the Commissioner that he was a "bona fide resident" of a foreign country or countries throughout the entire taxable year.

A citizen of the United States who is employed in a foreign country on a war construction project and living in more or less temporary quarters which he will in all probability abandon upon the termination of such employment in the foreign country, must be classified as a transient (with respect to such foreign country), and not as a bona fide resident of a foreign country within the meaning of section 116(a)(1) of the Internal Revenue Code, as amended, *supra*.

While the administrative interpretations in the form of I.T.s do not, of course, have the same force and effect as departmental regulations and rulings, it is believed that in a case such as we have here where Congress has in express language vested in the Commissioner discretionary powers to determine certain questions of fact in the administration of the statute, the Commissioner's administrative interpretation in effect at the time the deficiency was determined should be accorded some con-

sideration, particularly where they reveal a uniform and consistent practice. Of course, if [45] the office construction given in I.T. 3642, *supra*, was wrong, it should be given no weight, but we are not convinced that it was wrong. While, as we have already said, petitioner for the entire year of 1943 was overseas and was rendering valuable and essential services as an employee of Lockheed to the war effort, nevertheless, we do not think it can be said, under the facts, that he was a "bona fide resident of a foreign country or countries" during such period under section 116. Following our decision in *Arthur J. H. Johnson*, *supra*, we decide this issue in favor of respondent.

The deficiency determined against Michael Downs did not impose any delinquency penalty because it was stated in the deficiency notice that "Taxpayer filed a nontaxable return for 1943 claiming exemption under Section 116 of the Internal Revenue Code."

In the determination of the deficiency against Eleanor J. Downs, the Commissioner added a delinquency penalty of 25 per cent, stating as a reason therefor: "Mrs. Downs did not file a return in the belief that her share of the community income was nontaxable income and that she had no filing requirement." The petition filed by her in Docket No. 9644 did not assign any error as to the imposition of this delinquency penalty. It simply alleged that in his determination of the deficiency the Commissioner "erroneously included the sum of \$5438.50 earned outside the United States by

taxpayer's husband, while a bona fide resident of North Ireland." Of course, if that allegation of error had been sustained there would have been no deficiency and therefore no penalty. Neither party in his brief discusses the delinquency penalty imposed in the case of Eleanor. Where a delinquency penalty has been imposed the burden of proof is on the taxpayer [46] to show that his failure to file a return was due to reasonable cause and not to wilful neglect. No such showing has been made in the instant case. Therefore the delinquency penalty determined against petitioner Eleanor J. Downs must stand. See section 3612(d)(1) I.R.C. See also Economy Savings and Loan Co., 5 T.C. 543.

Reviewed by the Court.

Decisions will be entered for the respondent.

Leech, J., dissents.

[Seal] [47]

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The Tax Court of the United States  
Washington

Docket No. 9643

MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

### DECISION

Pursuant to the determination of the Court, as

set forth in its Findings of Fact and Opinion promulgated October 24, 1946, it is

Ordered and Decided: That there is a deficiency in income tax for the calendar year 1943 in the amount of \$225.79.

/s/ EUGENE BLACK,  
Judge.

Entered: Oct. 25, 1946. [48]

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In the Tax Court of the United States

Docket No. 9643

MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 9644

ELEANOR J. DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

### STIPULATION AS TO VENUE

Pursuant to Section 1141 (b) (2) of the Internal Revenue Code and under the authority of Industrial

Ass'n vs. Commissioner, 323 U. S. 310, the parties hereto, through their respective counsel, hereby stipulate and agree to, and do, designate the United States Circuit Court of Appeals for the Ninth Circuit as the court to review the above-entitled causes.

/s/ROBERT A. WARING,  
Counsel for Petitioners.

/s/ SEWALL KEY,  
Acting Assistant Attorney  
General,  
Counsel for Respondent.

Dated this 3rd day of March, 1947.

Received and filed March 10, 1947. [49]

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United States Circuit Court of Appeals  
for the Ninth Circuit

Docket No. 9643

MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

PETITION FOR REVIEW OF DECISION OF  
THE TAX COURT OF THE UNITED  
STATES

To the Honorable Judges of the United States  
Circuit Court of Appeals for the Ninth Circuit:



Comes now Michael Downs, petitioner herein and respectfully shows:

I.

Nature of the Controversy

The Respondent determined a deficiency in the income tax against the Petitioner for the calendar year 1943 in the amount of \$225.79.

This deficiency arose from the denial of taxpayer's claim to exemption from individual income tax for the calendar year 1943, of his salary from Lockheed Overseas Corporation while a bona fide resident of the British Isles and North Ireland [50] within the meaning of Sec. 116(a)(1) as amended by Sec. 148 (a) of the Revenue Act of 1942 and under Sec. 29.211-2 of Treasury Regulations 111.

In a companion proceeding, the Commissioner also determined a deficiency of \$219.52 and a penalty of \$54.88 against Eleanor J. Downs, wife of petitioner, for the calendar year 1943, arising from the denial above specified.

Petitioner and his wife, Eleanor J. Downs, each filed an appeal to the Tax Court of the United States, which appeals were, upon trial thereof, consolidated for trial and opinion.

Thereafter on October 25, 1946, The Tax Court of the United States rendered its decision in favor of the respondent. Said decision describes in detail the controversy involved, which briefly is as follows:

Early in 1942, Lockheed Aircraft Corporation (L. A. C.) entered into a contract with the United

States government to organize, equip and operate an aircraft depot at Belfast in Northern Ireland to employ a large number of skilled mechanics (ultimately some 5,400 American citizens in all). These were picked mechanics from varied industries throughout the United States but mostly from aircraft industries in California. Actually the operation was under a subsidiary, Lockheed Overseas Corporation (L. O. C.) and was under direction of the U. S. Army as operation "Magnet."

Downs was employed at Burbank, California, by L. A. C. from Jan. 1, 1942, until about April 23, 1942, when he made [51] application and signed a contract for overseas employment with L. O. C. and shifted to same. In his written application he stated that he was willing to stay for over two years. The contract provided that L. O. C. would reimburse him for any and all taxes lawfully levied or assessed by any foreign government against him while an employee of the corporation in the British Isles and North Ireland.

On June 30, 1942, he embarked at New York Harbor on the H. M. S. Orangi, a vessel of British Registry, arriving in the British Isles about July 14, 1942, where he was first assigned to an R. A. F. base near Liverpool in the capacity of a field and service mechanic. Later he was transferred to Ireland for a short time; after which he was moved from time to time to different air bases in England and Ireland.

As of May 1, 1943, he entered into a written contract with Lockheed in which he agreed to render

such services in connection with said aircraft depot as might reasonably be assigned to him for the duration of the contract between the Government and Lockheed as from time to time extended (which meant for the duration of the war and beyond).

Under the conditions of his contract and of the contract between our Government and Lockheed he could not take his family with him had he wanted to do so and they remained in their home in Los Angeles, his wife and their three minor children.

At no time during his stay overseas did the British demand any income tax of him nor did our Treasury Department require any income tax to be withheld from his salary by L. O. C. although ninety per cent of said salary was deposited by L. O. C. to the credit of Downs in his Bank in the United States per Article 2 of his employment contract.

Within ninety days of his return, July 12, 1944, to New York City, taxpayer made an income tax return of his total salary, domestic and foreign, earned for the calendar years 1942, 1943 and 1944, to the Collector at Baltimore, Maryland, in which he claimed to be exempt from individual income tax for the period he was overseas on the ground that he was then a bona fide resident of the British Isles as first herein noted. These returns were later transferred to the Los Angeles office of the Collector and the deficiency tax herein at issue was assessed by that office.

In its opinion, The Tax Court points out that taxpayer and the Government agree that in as much as Sec. 116 I.R.C. does not define the meaning of

“bona fide resident of a foreign country or countries,” that Treasury Regulations 111, Sec. 29.116-1 and 29.211-2 must be looked to to find the correct interpretation of the words thus used in the statute.

The pertinent part of the latter section which is decisive of the issue here involved, defines a resident for the purpose of the income tax. It is designed to tax aliens resident in this country but has been repeatedly held by the Treasury Department [53] and The Tax Court to equally apply in reverse to citizens of the United States while abroad. The substantial part of the Section reads thus:

“\* \* \* One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned.”

The Tax Court, conceding there could be no question of the bona fides or good faith of taxpayer, but disregarding the plain language of the above Regulations, found that Congress had in express language vested in the Commissioner discretionary powers to determine this question of residence and that the attitude of the Commissioner is correctly stated in I. T. 3642 Cum. Bull. 1944, page 262. This

I. T. concerns a citizen of the United States who went to Canada Jan. 1, 1943, on a war project for the year 1943 and who intended to remain there until May, 1944.

Following its decision in *Arthur J. H. Johnson*, 7 T.C., decided the same day as the *Downs* case, the United States Tax Court held that Michael Downs was not a bona fide resident of the British Isles for the calendar year and that his overseas income for that year was therefore taxable. So closely is the *Downs* decision tied into that of *Johnson* that one cannot well read the *Downs* decision without a copy of the *Johnson* decision and yet the *Johnson* case is not in point because he went to Greenland for a limited period; where, under a "condition unique in [54] history" (in the language of the Tax Court) the United States, in a treaty with Denmark, had complete jurisdiction in the bases in Greenland over all persons except Danish citizens and native Greenlanders.

Petitioner contends that the Tax Court erred in the following particulars:

(a) In finding as a fact or deciding as a matter of law that the Commissioner of Internal Revenue has discretionary power to disregard the plain language of Regulations 111, Sec. 29.211-2, as above quoted, and assess the tax here involved;

(b) In finding as a fact or deciding as a matter of law that I. R. C. Sec. 116 (a) (1) vested in the Commissioner discretionary power to determine that taxpayer was not a resident of the British

Isles for the taxable year 1943, even though he acted bona fide and met the conditions of Regulations 111, Sec. 29.211-2.

## II.

### The Court in Which Review Is Sought

The United States Circuit Court of Appeals for the Ninth Circuit is the Court in which review of said decision of The Tax Court of the United States is sought pursuant to the provisions of Section 1141 of the Internal Revenue Code. [55]

## III.

### Venue

For more than two years last past preceding, petitioner has resided in the County of Los Angeles, State of California. The deficiency notice involved in this appeal was issued by the Collector of Internal Revenue at Los Angeles in the Sixth District of California, whose office is located within the Ninth Judicial Circuit of the United States. The hearing before the United States Tax Court was held in Los Angeles, California.

The parties hereto have not stipulated that said decision may be reviewed by any Court of Appeals other than the one herein designated.

Wherefore, the Petitioner prays that the decision of The Tax Court of the United States herein be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit; that a transcript of the record be prepared in accordance with the law and rules of said Court and transmitted to the Clerk of said Court for filing; and that appropriate action

be taken to the end that the errors complained of may be reviewed and corrected by said Court.

Dated: January 18, 1947.

ROBERT A. WARING,  
Attorney for Petitioner.

Received and filed T.C.U.S., Jan. 21, 1947. [56]

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[Title of Circuit Court of Appeals and Cause.]

NOTICE OF FILING PETITION  
FOR REVIEW

To: John P. Wenchel, Chief Counsel, Bureau of  
Internal Revenue, Washington, D. C.,  
Attorney for the Respondent:

Please Take Notice that on the 21st day of January, 1947, the undersigned filed with the Clerk of the Tax Court of the United States the petition of Michael Downs, a copy of which is annexed hereto, for the review by the United States Circuit Court of Appeals for the Ninth Circuit of the final order and decision of the Court heretofore rendered in the above-entitled case. Dated this 21st day of January, 1947.

ROBERT A. WARING,  
Attorney for the Petitioner.

Admission of Service

Service of a copy of the above notice and a copy

of the petition for review is hereby accepted this 21st day of January, 1947.

/s/ J. P. WENCHEL,

Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

Filed T.C.U.S., Jan. 21, 1947. [57]

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[Title of Circuit Court of Appeals and Cause.]

PETITIONER'S STATEMENT OF POINTS  
TO BE RELIED ON AND DESIGNATION  
OF PARTS OF THE RECORD TO BE  
PRINTED

Comes now Michael Downs, the petitioner for review in the above entitled cause, and states that the points on which he intends to rely in this cause are as follows:

1. The Tax Court of the United States erred in finding as a fact or deciding as a matter of law that the Commissioner of Internal Revenue has discretionary power to disregard the plain language of Regulations 111, Section 29.211-2, and assess the tax here involved;

2. The said Tax Court erred in failing to find as a fact and to decide as a matter of law that petitioner, under said Section 29.211-2 of said Regulations was a bona fide resident of the British Isles and North Ireland for the calendar year 1943, and exempt from income tax on his overseas salary of \$5438.50 for that year.



3. The said Tax Court erred in finding as a fact or deciding as a matter of law that I.R.C., Section 116 (a) (1) vested in the [58] Commissioner discretionary power to determine that petitioner was not a resident of the British Isles for the taxable year 1943, even though he acted bona fide and met the conditions of Regulations 111, Section 29.211-2; and said Court erred in failing to find that under said section of I.R.C. and under said section of said Regulations, petitioner was exempt from income tax on his said overseas salary.

Petitioner hereby designates the entire record, as certified to the Clerk of the above entitled Court, as necessary to be printed for the consideration of the points set forth above.

/s/ ROBERT A. WARING,  
Attorney for Petitioner.

Service admitted March 21st, 1947.

/s/ J. P. WENCHEL. EMP

Received and filed T.C.U.S., March 24, 1947. [59]

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The Tax Court of the United States

Docket No. 9643

MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

## STATEMENT OF EVIDENCE

The following is a statement of evidence in narrative form in the above entitled cause.

This cause came on for hearing before Honorable Eugene Black, Judge of The Tax Court of the United States, on June 20, 1946, Robert A. Waring, Esq., appearing on behalf of Petitioner and A. J. Hurley, Esq. (Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue), appearing on behalf of Respondent.

It was stipulated between Counsel that the cases of Michael Downs, Docket No. 9643 and Eleanor J. Downs, Docket No. 9644, be consolidated and the Court so ordered.

Stipulations of facts between counsel for petitioner and respondent were received by the Court, in evidence as Petitioner's Exhibit No. 1.

On being asked by the Court if he wished to make an opening statement of the facts,

Mr. Waring, for petitioner, stated that Section 116(a)(1) of the Revenue Code in effect for the calendar year 1943 extends an exemption from income tax in the case of an individual citizen of the United States who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries, during the entire taxable year; that he would prove that there was no question about the bona fides or good faith of these Lockheed Overseas men.

And secondly, that he expected to prove that petitioner was a resident over there within the plain

language of Regulations 111 Section 29.211-2(b) which, in reverse, applies to our citizens abroad. The section in part reads—"One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned——". The government admits that this provision applies in reverse to citizens of the United States.

Within the language of this section he would not attempt to prove that these men intended to stay over there permanently or got passports to do so; he would admit they intended to remain citizens of and domiciled in the United States. He would attempt to prove merely that these men, under their contract, went over there for the duration of the war, plus such additional time as might be necessary for Lockheed to perform its contract with the Army.

Whereupon,

MAURICE VERNER MILLER

was called as witness for respondent and testified that he was then acting British Vice-Consul in the British Consulate General at Los Angeles; that the principal part of his work is issuance of visas to American citizens for travel to the British Isles. Being shown a copy of a visa issued to an employee of Lockheed Overseas Corporation, he was asked if such visa permitted the holder thereof to remain indefinitely in the British Isles. He replied that the visa would permit the holder to remain for the purpose for which it was given as an employee of Lockheed, and if Lockheed terminated the work over there, he would be expected to depart within a reasonable time when transport was available, and subject to any extensions that might be given him by the Home Office in London, or local authorities in Belfast. This visa is valid for three months. Now actually that means that it must be utilized within a period of three months, but the period which the gentleman might stay there is not defined in the visa as he reads it.

---

Whereupon,

MICHAEL DOWNS,

called as a witness for and on behalf of himself, the petitioner, testified in part as follows:

I am now living at 246 North Avenue 49, Los Angeles. Eleanor J. Downs is my wife, and was

my wife when I went ocerseas, and we had three children at that time.

Prior to embarking, we were instructed and were under restrictions about leaving the boat, or about communicating with any person. Early in the afternoon we all ate lunch and they took us into a large room with guards outside the door, and we were not to talk to anyone or use the telephones, and we stayed in that [62] room and we were all told our instructions and why we were there. It was going to be a secret mission and they didn't want anyone to know about it. It was an Army colonel—an Air Force colonel, that told us about that, and from then on we were not able to communicate with anyone. We were immediately taken from that room and lined up, put in busses and taken to the boat, and put on it, and from then on we couldn't get off, and had to stay on the boat all together. We were going away on a war mission and it had to be kept a secret. We were down below decks. We never did get up on deck. We landed in Glasgow, Scotland, about fifteen days later, after being chased all over the ocean by submarines.

I was taken down to an RAF base with nineteen other men to help them get some ships into the air that had been damaged. A lot of the other men had gone to Ireland, but I myself, with some other men, were sent to a base outside of Liverpool, to help the RAF men out, to get their ships into the air.

In 1942 I was a field and service mechanic, but at that time the man that was over us, he had given me some men to work with me, to instruct them,

which I did. I took them with me up to this Royal Air Force base. We stayed over there—well, I went back and forth, off and on, for quite a while, because later on I had battle damage crews over there, repairing ships that were shot up,—the American air force, the English air force, and including the Polish air force. We helped to repair some of their ships. We lived all over England. We went through some bombings. Five of them in one week.

I went to Ireland, I think it was the latter part of July or the first of August, and then I went back to England again [63] after that to work, as I say, with these battle damage crews, English air force, and the American air force.

When I went over I intended to stay until the war was over. I didn't know how long it was going to be, but I knew they needed men pretty bad. So I volunteered to go, signed my contract and went. They asked me to stay, so I did, stayed till the last one. During 1942 and 1943 I had no way of knowing when I might return to the United States.

In my application for overseas service, I was informed that I couldn't take my wife with me. During most of my time overseas, I lived at various bases in England and Ireland. Board and lodging was provided for by either the British Army or Lockheed Overseas Corporation or the American Air Force.

The condition in my contract was that ten per cent of the money I earned during 1943 from LOC was paid to me overseas and ninety per cent deposited to my account in California, here. When the

war was over, I naturally intended to return to the U. S. on account of having my family here. I returned to the United States in July, 1944.

I didn't pay any income taxes to the Government of North Ireland or to the United Kingdom during 1943 or for any other year. I was never asked to pay a tax by anyone. No attempt was made to withhold tax on the 90% of my income that was kept in the U. S. after June, 1943. Nothing was ever held out of that, not even social security was held out of that.

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Whereupon,

BELMONT WESLEY MESSER,

called as witness for petitioner, testified in part as follows: [64]

At the time of the organization of the group of Lockheed Overseas men that went over to Britain and Ireland, my position was that of manager of the Industrial Relations department of Lockheed Overseas Corporation. Before we left to go overseas, it was necessary to employ about three thousand men between the middle of January and the first of July, 1942. We were very much under the direction of the Army. It became necessary for us to appeal to organizations throughout the United States in order to obtain the very specialized types of mechanics that we needed. We went into the engine factories back east, and watch repair plants for skilled instrument people, and at that time re-

ceived co-operation in the form of telegrams from General Arnold to practically all manufacturers in the United States to release to us such essential personnel as we felt we needed. The base in Ireland had a much wider scope than simply maintenance. In fact, as we went along it became more and more of a modification base. As the aircraft that were developed in this country were sent to the war fronts, and put into operation, it was determined that under flying conditions and under actual war-time conditions, several weaknesses existed. As these men returned from missions, bombing missions and all sorts of flying missions over Europe, the faults of aircraft as produced in this country were determined, and it was the responsibility of our base, in behalf of the Eighth Air Force and Ninth Air Force, to redesign and rebuild as necessary the aircraft that was being sent to us to the Army, in order to make them maximumly effective in service. That made the base very much subject to bombing by the German fliers. Due to the nature of the project, and the uncertainty of people returning, we were instructed by the management of the corporation [65] to make the picture to the individuals about to be employed as black as possible. We knew we were going over there at the time when the submarine hazard was the greatest during the entire war. Our contracts stipulated that we were more or less on our own, if taken prisoner, and at the time the men were going over we pointed out to them the possibility of being taken prisoner or being bombed, or being sunk by a submarine, was very serious.



I was in North Ireland from approximately June 26th of 1942 continuously until the first part of July, 1944. The project was referred to as Operation Magnet. The total number of American citizens at any one time on the base was in the vicinity of three thousand. The total number of employees, counting those who came over and returned before the completion, brought the total number of people who went to the project and returned, to approximately five thousand and four hundred.

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Whereupon,

LEWIS R. OSGOOD,

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

When the Lockheed Overseas group was being organized early in 1942, I was Personnel division supervisor for them (under Mr. Messer). Personally, in the early part of 1942 and approximately in May, I was sent east for a short period to interview a number of applicants in the various aircraft and accessory plants, and our instructions were to paint rather a black picture, or one which indicated the possibilities, so that they would understand, and discourage anyone who might be there just for the trip, although this first contract they were signing was for only six months. In [66] our interview,

however, we got their reaction to a longer period of time, as the form which has been produced before the court notes, and in our conversation we were not interested, would not employ anyone who was not interested in staying at least a year, and if there was an indication of a return even at that time, we were somewhat doubtful because we felt that it was a long term project.

Approved:

/s/ J. P. WENCHEL, C.A.R.

Received and filed March 24, 1947. [67]

United States Circuit Court of Appeals  
for the Ninth Circuit

Docket No. 9643

MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

PETITIONER'S DESIGNATION OF  
CONTENTS OF RECORD ON REVIEW

Petitioner hereby designates for inclusion in the record on review in the above entitled proceeding, the following:

The complete record of all the proceedings and evidence taken before The Tax Court of the United States and all matters required by Subdivision (g) of Rule 75 of the Federal Rules of Civil Procedure; excepting exhibits filed as evidence, but including the statement of evidence in this cause heretofore prepared, served and filed.

Dated March 13th, 1947.

/s/ ROBERT A. WARING,  
Attorney for Petitioner.

Service admitted March 21st, 1947.

No counter designation will be filed.

/s/ J. P. WENCHEL, C.A.R.

Received and filed T.C.U.S. March 24, 1947. [68]

The Tax Court of the United States  
Washington

Docket No. 9643

MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States, do hereby certify that the foregoing pages, 1 to 68, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 31st day of March, 1947.

[Seal]      /s/ VICTOR S. MERSCH,  
Clerk, The Tax Court  
of the United States.

[Endorsed] No. 11578. United States Circuit Court of Appeals for the Ninth Circuit. Michael Downs, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed April 4, 1947.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.



No. 11578

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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MICHAEL DOWNS,

*Petitioner,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

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PETITIONER'S OPENING BRIEF.

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**FILED**

JUL 22 1947

**PAUL P. O'BRIEN,**

ROBERT A. WARING,

**CLERK**

412 West Sixth Street, Los Angeles 14,

*Attorney for Petitioner.*





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No. 11578

IN THE

United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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MICHAEL DOWNS,

*Petitioner,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

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PETITIONER'S OPENING BRIEF.

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**Preliminary Statement.**

The above case is companion to that of *Eleanor J. Downs v. Commissioner*, No. 11579; she being the wife of Petitioner and stipulation of the parties has been filed with this Court in her case to abide the decision herein. Also this case was stipulated to be tried before the Tax Court with *J. Gerber Hoofnel v. Commissioner*, No. 11593 herein, as the basic facts are identical. These are in effect test cases involving hundreds of men employed at the Lockheed Overseas base in Ireland during the world war. Action has been suspended by the Treasury Department in many of these cases pending outcome herein.

### Jurisdiction.

The Commissioner of Internal Revenue, Respondent herein, on August 28, 1945, acting through the Collector of the Sixth District of California at Los Angeles, mailed to Petitioner a notice of deficiency wherein, so far as material to this proceeding, the Respondent proposed additional income taxes for the calendar year 1943 in the sum of \$225.79. [R. 8-12.]

Within the ninety day period, Petitioner, pursuant to Sec. 272(a) I. R. C., filed a petition with the Tax Court of the United States wherein it was alleged, among other things, that in determining the net income for the year 1943, the Commissioner and Revenue Agent in Charge erroneously included the sum of \$5,438.50 earned outside of the United States by a taxpayer while a bona fide resident of North Ireland, which said action by Respondent gave rise to the asserted deficiencies in tax and was erroneous. [R. 4-7.] Issue was duly joined by Respondent's answer. [R. 13-14.] The proceedings came on for hearing on June 20, 1946, before Honorable Eugene Black, Judge of The Tax Court of the United States. [R. 80-88.] Thereafter on October 24, 1946, the Court entered its memorandum Findings of Fact and Opinion [R. 51-68], and on October 25, 1946, entered its decision that there was a deficiency in income tax for the calendar year 1943 in the amount of \$225.79. [R. 68-69.]

Pursuant to Sec. 1142 I. R. C., on January 21, 1947, Petitioner filed a petition for review by this honorable

Court with The Tax Court of the United States, invoking jurisdiction under Sec. 1141 I. R. C. [R. 70-77] and on said January 21, 1947, served notice thereof on Respondent. [R. 77-78.] A statement of points to be relied upon was served upon Respondent on March 21, 1947, and filed March 24, 1947. [R. 78-79.]

Petitioner at all the times herein mentioned was and is a resident of the County of Los Angeles except during the period of his employment overseas as herein set forth. He filed his income tax return for the calendar year 1943 with the Collector of Internal Revenue at Baltimore as provided in Section 53(b)(1), Internal Revenue Code, but said return was by agreement with taxpayer reviewed and audited by the Collector of Internal Revenue and by the Revenue Agent in Charge in Los Angeles, California, in the Sixth Collection District of California; and deficiency notices were issued by said Collector of said Sixth District of California. [R. 8 *et seq.*]

And, pursuant to Section 1141(b)(2) of the Internal Revenue Code, Petitioner and Respondent through their respective counsel did, on March 3, 1947, stipulate and agree to and did designate the United States Circuit Court of Appeals for the Ninth Circuit as the Court to review the above entitled cause, which stipulation was filed with the Clerk of said Court on March 10, 1947. [R. 69-70.]

### Questions Involved.

The Tax Court held that Petitioner was not, during the calendar year 1943, a resident of Great Britain and North Ireland within the meaning of Section 116, Internal Revenue Code, printed in the margin of its opinion. [R. 61.]

This section exempts from income tax "an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year." [R. 61.]

The questions raised on this appeal are:

1. What does Section 116, Internal Revenue Code, mean by "resident"?

2. Do the words "bona fide" limit the discretionary power of the Commissioner in determining whether or not the citizen is a resident to his satisfaction; or does he have the authority by the statute to determine residence regardless of the good faith of taxpayer?

3. Do Regulations 111, Sections 29.211-2 [R. 63-64] defining the term resident as used in the statute control the discretionary power of the Commissioner?

We contend that the Commissioner and the Tax Court misconstrued Section 116, Internal Revenue Code, *supra*, and Regulations 111, Sections 29.211-2, *supra*, and misapplied same to the stipulated and uncontroverted evidence which is here and now as available to your Honorable Court as it was to said Commissioner and Tax Court: said facts being hereinafter set forth, to-wit:

### Statement of Facts.

Early in 1942 Lockheed Aircraft Corporation (L. A. C.) entered into a contract with the United States Government to organize, equip and operate an aircraft depot at Belfast in North Ireland. [Stipulation Exhibit 2.] [R. 19.]

Between the middle of January and first of July, 1942, Industrial Relations Manager B. W. Messer and his assistant Lewis R. Osgood recruited about 3000 men—specialized types of mechanics from industries throughout the United States. They went into engine factories back east and watch repair plants for skilled instrument people. General Arnold (Hap Arnold) telegraphed to practically all manufacturers in the United States to release such personnel as Lockheed Overseas needed. [B. W. Messer, R. 85-86.]

This was not to be a mere maintenance base in North Ireland. It was rather to be and become a “modification” base. These men were to be near the flying base, to be in close touch with our bombers as they returned from day to day from their sorties over Europe, to re-design and re-build as necessary and overcome the faults of aircraft produced in this country; to determine under actual war conditions any weakness in our planes and immediately repair same. Obviously this made the Lockheed Irish bases very much an object for bombing by German fliers. [B. W. Messer, R. 86.]

Due to the nature of the project and uncertainty of the men returning, the employment force was instructed by management of the corporation to make the picture to prospective employees as dark as possible. They were to cross the Atlantic when the submarine hazard was the greatest during the entire war. The contract stipulated that the men were more or less on their own, if taken prisoner. And the interviewers for Lockheed pointed out to these men that the possibility of being taken prisoner or being bombed, or being sunk by a submarine, was very serious. [Messer, R. 86.]

Although the first contract these men signed was for only six months, the application which these men signed and the interview with them was designed to eliminate a prospect who was not interested in staying overseas at least a year, because management then felt it was a long time project. [Lewis R. Osgood, R. 87-88; Application, R. 18.]

Michael Downs made application for foreign service on or about April 22, 1942, at Lockheed Placement Division, Burbank, California. He was then living with his wife, Eleanor J. Downs, at 246 N. Ave. 49, Los Angeles, California. In answering the questions on his application he stated that he was willing to go to any part of the world and that he understood his services might be in a war combat zone and travel to this point would be hazardous and that he could not take his wife or any member of his family. [Application, R. 18.]



It was noted on his application that his special qualifications were hydraulics and plumbing, electrical and rigging—14 months—Lockheed Plant #1; 18 years experience as service manager automobile motors. His application bore a special endorsement that he was very well thought of by his supervisor—very sincere, honest and interested in his work—“a hustler if ever there was one.” [Application, R. 18.]

From Jan. 1, 1942, to June 30, 1942, Petitioner was employed as an aircraft mechanic in the United States by Lockheed Aircraft Corporation and Lockheed Overseas Corporation, of Burbank, Calif. [Stipulation, R. 15.]

In May, 1942, he signed the above noted contract with Lockheed Overseas Corporation for services in the British Isles. [Ex. 2, R. 19-33.] Pursuant to said contract he embarked June 30, 1942, on H.M.S. Orangi, a vessel of British registry (at New York Harbor). [Stipulation, R. 15.]

Downs testified “Prior to embarking, we were instructed and were under restrictions about leaving the boat, or about communicating with any person. Early in the afternoon we all ate lunch and they took us into a large room with guards outside the door, and we were not to talk with anyone or use the telephones, and we stayed in that [62] room and we were all told our instructions and why we were there. It was going to be a secret mission and they didn’t want anyone to know about it. It was

an Army colonel—an Air Force colonel, that told us about that, and from then on we were not able to communicate with anyone. We were immediately taken from that room and lined up, put in busses and taken to the boat, and put on it, and from then on we couldn't get off, and had to stay on the boat all together. We were going away on a war mission and it had to be kept a secret. We were down below decks. We never did get up on deck. We landed in Glasgow, Scotland, about fifteen days later, after being chased all over the ocean by submarines." [R. 83.]

From Glasgow, he was taken to an R. A. F. base with nineteen other men to help them get ships into the air that had been damaged. He had battle damage crews repairing ships that were shot up—the American Air Force, the R. A. F., and Polish Air Force. He lived all over England; went through some bombings, five of them in one week. He testified: "When I went over I intended to stay until the war was over. I didn't know how long it was going to be, but I knew they needed men pretty bad. So I volunteered to go, signed my contract and went. They asked me to stay, so I did, stayed till the last one. During 1942 and 1943 I had no way of knowing when I might return to the United States. [Michael Downs, R. 83-84.]

In my application for overseas service, I was informed that I couldn't take my wife with me. During most of my time overseas I lived at various bases in England

and Ireland. Board and lodging was provided for by either the British Army or Lockheed Overseas Corporation or the American Air Force. [Downs, R. 84.]

The condition in my contract was that ten per cent of the money I earned during 1943 from L O C was paid to me overseas and ninety per cent deposited to my account in California, here. When the war was over, I naturally intended to return to the U. S. on account of having my family here. I returned to the United States in July, 1944.

I didn't pay any income taxes to the Government of North Ireland or the United Kingdom during 1943 or for any other year. I was never asked to pay a tax by anyone. No attempt was made to withhold tax on the 90% of my income that was kept in the U. S. after June, 1943. Nothing was ever held out of that, not even social security was held out of that. [Downs, R. 85.]

As of May 1, 1943, petitioner entered into a written contract with Lockheed in which he agreed to render such services in connection with said aircraft depot as might reasonably be assigned to him for the duration of the contract between the Government and Lockheed as from time to time extended (which meant for the duration of the war and beyond). [Ex. 3, R. 37.]

STATEMENT OF POINTS RELIED UPON.

1. The Tax Court of the United States erred in finding as a fact or deciding as a matter of law that the Commissioner of Internal Revenue has discretionary power to disregard the plain language of Regulations 111, Sections 29.211-2, and assess the tax here involved;

2. The said Tax Court erred in failing to find as a fact and to decide as a matter of law that petitioner, under said Sections 29.211-2 of said Regulations was a bona fide resident of the British Isles and North Ireland for the calendar year 1943, and exempt from income tax on his overseas salary of \$5438.50 for that year.

3. The said Tax Court erred in finding as a fact and deciding as a matter of law that Internal Revenue Code, Section 116(a)(1), vested in the Commissioner discretionary power to determine that petitioner was not a resident of the British Isles for the taxable year 1943, even though he acted bona fide and met the conditions of Regulations 111, Sections 29.211-2; and said Court erred in failing to find that under said section of Internal Revenue Code and under said section of said Regulations, petitioner was exempt from income tax on his said overseas salary.

## ARGUMENT.

If the decision of the Tax Court that petitioner was not a *bona fide* resident of Great Britain and North Ireland during the calendar year 1943 be regarded as a finding of fact, it is contrary to the uncontroverted evidence; and therefore such decision may be properly reviewed by this Honorable Court.

If this portion of the decision of the Tax Court be regarded as a conclusion of law, then it is also a proper subject of review by this Honorable Court.

*Bogardus v. Commissioner*, 302 U. S. 34, 58 S. Ct. 61, 82 L. Ed. 32;

*Claridge Apts. Co. v. Commissioner of Internal Revenue*, 89 L. Ed. 139.

## Applicable Law.

Section 116, I. R. C., reads as follows:

“Sec. 116. EXCLUSIONS FROM GROSS INCOME.  
(As amended by sec. 148 (a), Revenue Act of 1942.)

In addition to the items specified in section 22 (b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) EARNED INCOME FROM SOURCES WITHOUT THE UNITED STATES.—

(1) Foreign Resident for Entire Taxable Year.—  
In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a *bona fide* resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United

States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25 (a) if received from sources within the United States; but such individuals shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.”

### Purpose and Intent of Section 116, I. R. C.

By its very wording it is plain that Congress intended that this section should have a liberal and not a narrow and restricted meaning.

To better understand this it is well to consider how this section read prior to its amendment in the latter part of 1942.

When the three thousand or more Lockheed men were employed to go overseas in the early half of 1942, the law then exempted from tax gross income to an individual citizen of the United States who was a *bona fide* non-resident of our country for more than six months during the taxable year.

In *Commissioner of Internal Revenue v. Fiske's Estate*, 128 F. (2d) 487 (certiorari denied 317 U. S. 635), construing this section as it stood in 1942, the Court said:

“It is agreed that Sec. 116(a) was intended to stimulate foreign trade, and to relieve our citizens resident in foreign countries, engaged there in the promotion of American foreign trade for more than six months of the taxable year, from tax upon the income which they earned in the foreign country. In construing the phrase ‘*bona fide* nonresident of the United States for more than six months during the taxable year,’ the Bureau of Internal Revenue has

interpreted it as applying to any American citizen actually outside the United States for more than six months during the taxable year, and this construction finds support in the legislative history of the act.”

However, the Report of the Senate Committee on Finance, C. B. 1942-2, pages 548, 549, found that:

“ . . . This provision of the present law has suffered considerable abuse, in the case of persons absentsing themselves from the United States for more than six months simply for tax-evasion purposes.”

After differences between the House of Representatives and the Senate, Congress finally enacted the present Section 116, *supra*, effective after December 31, 1942, requiring the citizen to establish to the satisfaction of the Commissioner that he is a *bona fide* resident of a foreign country during the entire taxable year, as shown in Revenue Act 1942, Section 148 (a).

In light of this legislation it seems clear that the words “to the satisfaction of the Commissioner” modify the words “*bona fide*” rather than change the meaning of the word resident as usually used in the taxing statutes. As an administrative measure it would seem very fitting and proper and effective for the Commissioner to determine whether or not the citizen in question be a *bona fide* resident.

There is no question about the good faith of petitioner or his Lockheed associates in absentsing themselves in Europe during the war. The Tax Court warmly admits this in the following statement:

“We agree that the good faith of petitioner in going overseas as an employee of Lockheed, and rendering important and essential services to the war

effort cannot be questioned. We do not understand that it is being questioned by the Commissioner.” [R. 65.]

It being agreed that there is no question of *bona fides* involved in this case, the next question is, does Section 116, I. R. C., *supra*, vest the Commissioner with discretion to modify or vary the well established rules of law and the Regulations that define what constitutes residence? Put in another way, in absence of any question of *bona fides*, do the words “to the satisfaction of the Commissioner” nevertheless attach to or modify the word “residence” as as used in Section 116, I. R. C., *supra*?

We contend that the amendment to that section of the revenue law was intended as an administrative measure to enable the Commissioner to limit the exemption from tax to citizens residing abroad in good faith and not for tax evasion. We contend that there is no intent to substitute the mind of the Commissioner for the ordinary rules of evidence that determine residence. Where the facts are uncontroverted, as they are here, your Honorable Court, being fully advised upon the law, is free to determine the question of residence here involved without any handicap created by the mind of the Commissioner.

In *Commissioner of Internal Revenue v. Svent*, 155 F. (2d) 513, at 515, the Court says:

“The word ‘resident’ (and its antonym ‘nonresident’) are very slippery words, which have many and varied meanings. Sometimes, in statutes, residence means domicile; sometimes, as in the instant case, it clearly does not. When these words, ‘domicile’ and



'residence,' are technically used by persons skilled in legal semantics, their meanings are quite different. This distinction is clearly set out in *Matter of Newcomb's Estate*, 192 N. Y. 238, 250, 84 N. E. 950, 754:

" 'As domicile and residence are usually in the same place, they are frequently used, even in our statutes, as if they had the same meaning, but they are not identical terms, for a person may have two places of residence, as in the city and country, but only one domicile. Residence means living in a particular locality, but domicile means living in that locality with intent to make it a fixed and permanent home. Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile.'

"We think the error into which the Tax Court fell was partially caused by a confusion of these terms in lending to the word 'residence' some attributes which really belong only to the word 'domicile,' and by laying too great stress, as to 'residence,' on the *animus revertendi*."

The Tax Court further erred in resting its decision in this case largely upon its decision made, just previously the same day, in *Arthur J. H. Johnson v. Commissioner*, 7 T. C. No. 122, because the cases are clearly distinguishable. Johnson went to Greenland with no such commitments and no such contract as petitioner had with L. O. C. A treaty with Denmark gave the United States Government peculiar jurisdiction over the territory in which it operated in Greenland. The dissenting opinion of Judge Leech in that case very well answers the position of the

majority that the taxpayer, in order to claim residence abroad, must show payment of tax there. Says the dissent:

“ . . . Neither Congress in the controlling statutory provision, nor the respondent in his regulations construing that provision, mentions such exemption as even affecting, much less controlling, the imposition of the contested tax. That it would have been easy to have done so is obvious. For us to interpolate such criterion seems to me to be judicial legislation.”

### **Regulations 111, Section 29.211-2, Remove Any Doubt About the Meaning of the Term “Residence.”**

If there were any doubt about the meaning of the term residence in Section 116, I. R. C., it is clearly removed by definition in Regulations 111, Section 29.211-2, which reads as follows:

An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he be-

comes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

Regulations 111, Sec. 29.116-1 provides in part . . .  
“Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principle of Sec. 29.211-2 . . . .”

Having admitted that the Commissioner is bound by Sec. 29.211-2 *supra*, nevertheless the Tax Court decided against petitioner largely on the Commissioner's interpretation of 116 I. R. C. in I. T. 3642 Cum. Bull. 1944, page 262, saying that “if the construction given in I. T. 3642 *supra* was wrong, it should be given no weight, but we are not convinced it was wrong.”

We agree that the decision of the Commissioner in I. T. 3642 *supra*, was not wrong. It was right because in that case a citizen of the United States, who went to Canada on January 1, 1943, where he was employed on a war project, intended to stay only until May 1944,—a fixed time of just over a year. He was clearly a transient as defined in Regulations 111, Sec. 29.211-2 *supra*.

But by this same section of Regulations, Downs was not a transient. He was a resident overseas for the full year

1943. He went overseas for an uncertain period as prescribed in said section of Regulations. The period was uncertain all through 1943 for he intended to stay for the duration of the war and beyond. The duration of the war was then emphatically uncertain for the Belgian Bulge had not yet taken place and no one knew when our Americans overseas would come back or if they ever would come back. He was over there temporarily, as the Section prescribes, but his purpose was of such a nature that an extended stay might have been necessary for its accomplishment. And so in the language of the Section he became a resident over there even though it was his intention at all times to return to his domicile when the purpose for which he came had been consummated or abandoned.

### Conclusion.

As noted at the beginning of this brief, this case of Michael Downs and the companion case of J. Gerber Hoofnel, No. 11593 are in fact test cases involving many of the men who were recruited by Lockheed Overseas Corporation in the first half of 1942, to make an extraordinary contribution to the success of our war effort.

Untold penalty will be imposed upon many of these men under the construction urged by Respondent. We do not ask for any strained construction of the law and Regulations involved but do seek an interpretation fair to them and consistent with the history of the legislation and of the administration of the statute involved.

When, after these men went overseas, Sec. 116 I. R. C. was amended, admittedly to prevent persons not acting *bona fide*, from easy evasion of the income tax. No effort was made to clarify the meaning of the term residence; no effort was made to require declaration of intent to change citizenship; no effort in fact was made to give this law any such interpretation as Respondent would here urge.

We respectfully urge:

That Your Honorable Court, in accord with the prayer of the petition herein, determine that there is no deficiency due from petitioner on his income for the calendar year ending December 31, 1943.

Respectfully submitted,

ROBERT A. WARING,

*Attorney for Petitioner.*



No. 11578

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**In the United States Circuit Court of Appeals  
for the Ninth Circuit**

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**MICHAEL DOWNS, PETITIONER**

*v.*

**COMMISSIONER OF INTERNAL REVENUE, RESPONDENT**

---

**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX  
COURT OF THE UNITED STATES**

---

**BRIEF FOR THE RESPONDENT**

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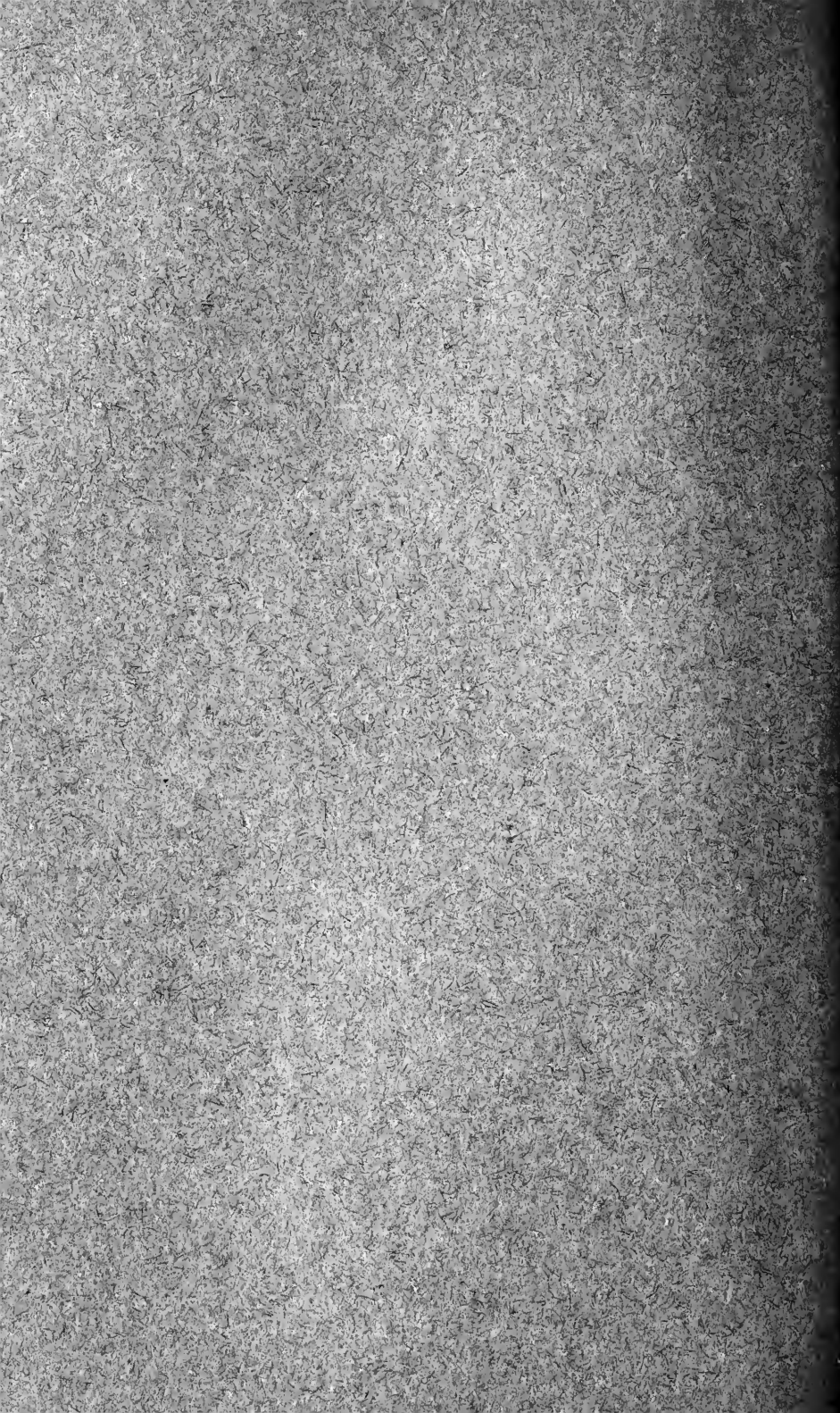
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**FILED**

**AUG 25 1947**

**PAUL P. O'BRIEN,  
CLERK**





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# In the United States Circuit Court of Appeals for the Ninth Circuit

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No. 11578

MICHAEL DOWNS, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

---

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX  
COURT OF THE UNITED STATES*

---

BRIEF FOR THE RESPONDENT

---

OPINION BELOW

The only previous opinion in this case is that of the Tax Court (R. 51-68) which is reported in 7 T. C. 1053.

## JURISDICTION

This petition for review involves a deficiency in income tax of the petitioner in this case (hereinafter referred to as the taxpayer) for the year 1943 in the amount of \$225.79. (R. 68-69, 70-77.)

On August 28, 1945, the Commissioner of Internal Revenue mailed to the taxpayer a notice of deficiency in income tax for the year 1943. (R. 8-12.) Within 90 days thereafter, namely, on November 21, 1945

(R. 2), the taxpayer filed with the Tax Court a petition (R. 4-12) for a redetermination of the deficiency, pursuant to Section 272 of the Internal Revenue Code. On October 25, 1946, the Tax Court entered its decision, sustaining the deficiency in the amount determined by the Commissioner. (R. 68-69.) Within three months after that decision, namely, on January 21, 1947 (R. 3), the taxpayer filed his petition (R. 70-77) for a review of the decision of the Tax Court, under the provisions of Sections 1141-1142 of the Internal Revenue Code. By stipulation in writing (R. 69-70) the parties herein have designated this Court as the court for review.<sup>1</sup>

#### QUESTION PRESENTED

Was the taxpayer a bona fide resident of a foreign country or countries during the taxable year 1943 and thus entitled, under Section 116 (a) of the Internal Revenue Code as amended by Section 148 of the Revenue Act of 1942, to an exemption for salary received from sources without the United States?

#### STATUTE AND REGULATIONS INVOLVED

The statute and Regulations involved are set forth in the Appendix, *infra*, pp. 31-35.

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<sup>1</sup> A similar stipulation for a review by this Court has been entered into by the parties in the companion case of *Eleanor J. Downs v. Commissioner*, cause No. 11579 in this Court, in which the taxpayer's wife is the petitioner, and which case, by further stipulation of the parties, is to abide by the result in the instant case.

## STATEMENT

The facts as stipulated (R. 14-17) and as found by the Tax Court (R. 54-60) are as follows:

Taxpayers Michael Downs and Eleanor J. Downs are husband and wife, citizens of the United States, residing in Los Angeles, California. Taxpayer Michael Downs timely filed an income tax return for the taxable year 1943 with the Collector of Internal Revenue for the District of Maryland. Taxpayer Eleanor J. Downs filed no return for the taxable year 1943. (R. 54.)

Early in 1942 Lockheed Aircraft Corporation entered into a contract with the United States Government in which the corporation agreed to organize, equip and operate an aircraft depot in Northern Ireland in connection with the war effort. The project was designated by the United States Army as operation "Magnet." In connection with the operation it was necessary for Lockheed Aircraft Corporation and its wholly owned subsidiary, Lockheed Overseas Corporation, sometimes hereafter referred to as Lockheed, to employ large numbers of skilled men in the United States and transport them to the British Isles. It was estimated that some 5,400 American citizens at one time or another, counting those who came over and returned before the completion of the job, were employed by Lockheed at the aircraft depot in Northern Ireland. (R. 54-55.)

From January 1 to June 30, 1942, taxpayer was employed as an aircraft mechanic in the United

States by Lockheed Aircraft Corporation at Burbank, California. (R. 55.)

On or about April 23, 1942, taxpayer made out and signed a formal application for overseas employment with Lockheed and in connection with such application signed a contract shortly thereafter with the corporation in which he agreed to perform services for the company at an aircraft depot to be operated by it in the British Isles. The application which taxpayer signed for employment with Lockheed was headed: "Application for Foreign Service." The application contained the following question (R. 55):

Are you willing to go to any part of the world? Yes.  
For how long? 1 year— 2 years— Longer—X.

Taxpayer in his application for foreign service thus indicated a willingness to serve as an employee of Lockheed overseas for more than two years, if necessary. The contract which taxpayer signed provided *inter alia* as follows (R. 55-57):

#### ARTICLE 1. Time and Duration of Employment

Contractor employs Employee to render services in connection with said aircraft depot with such duties as reasonably may be assigned to him, and Employee accepts such employment with knowledge of the conditions recited above. Subject to the terms and conditions hereinafter set forth, Employee's employment hereunder shall commence when he reports for duty at a point within the United States to be designated by Contractor, at the time and place designated by Contractor, and shall continue until November 1, 1942, or such later date as may be agreed

upon and thereafter until sixty (60) days after return transportation to the United States is made available by Contractor, it being understood that such return transportation shall be available on November 1, 1942, or the later date agreed upon or as soon thereafter as is practicable under the circumstances then existing.

#### ARTICLE 7, Housing, Subsistence and Medical Services

During the time that Employee is employed hereunder and remains at the place or places of his duty outside of the United States, Contractor shall furnish or cause to be furnished, without cost to Employee, such adequate food, lodging, special clothing and equipment, medical, nursing, and hospital services and treatment and recreational facilities as circumstances may reasonably permit.

Employee shall submit prior to departure and from time to time during his employment to such vaccination, inoculation, and/or any other medical, dental, surgical, nursing, and/or hospital treatment, preventative or curative, as the Contractor or other medical staff at the destination or elsewhere may from time to time specify, without expense to employee.

Contractor may direct the return to the United States of Employee, if in Contractor's judgment Employee's health condition is unfavorable.

#### ARTICLE 9. Taxes

Contractor shall either pay or reimburse Employee for any and all taxes lawfully levied or assessed by any foreign Government against Employee with respect to his residence, occu-

pation, salary, or income, provided, however, that Employee shall immediately notify Contractor in writing of any such levy or assessment and that Employee shall not pay any of such taxes as Contractor may direct him not to pay and that any claim for reimbursement shall be asserted in writing to Contractor within thirty (30) days after such payment, and provided further that Contractor shall save Employee harmless from any monetary loss resulting from or occasioned by Employee's failure to pay such taxes in compliance with instructions or directions given by Contractor.

Pursuant to the terms of his contract, taxpayer left the United States for the British Isles on June 30, 1942, and landed several weeks later in Glasgow, Scotland. (R. 57.)

Taxpayer was admitted to the British Isles on a visa as an employee of Lockheed. This visa, under British law, had to be put in use within three months from the date it was issued but the time that the holder would be allowed to stay is not mentioned therein. The visa, under British law, would permit him to remain for the purpose for which it was given, as an employee of Lockheed, and if and when Lockheed terminated its work over there, taxpayer would be expected to depart within a reasonable time when transport was available and subject to any extensions that might be given him by the home office in London or local authorities in Belfast. (R. 58.)

After disembarking taxpayer was first assigned to and R. A. F. base near Liverpool, England, in the capacity of a field and service mechanic. Later he



was transferred to Ireland for a short time after which he was moved from time to time to different air bases in England and Ireland where he performed essential services for the British Air Force, the American Air Force and the Polish Air Force, always as an employee of Lockheed. (R. 58.)

The expiration date of taxpayer's contract was extended by agreement of the parties until May 1, 1943, at which time he entered into a new contract with Lockheed. This new contract provided, *inter alia*, as follows (R. 58-59):

ARTICLE 1. Time and Duration of Employment

Contractor employs Employee to render services in connection with said aircraft depot with such duties as reasonably may be assigned to him, and Employee accepts such employment with knowledge of the conditions recited above. The term of Employee's employment hereunder shall \* \* \*

\* \* \* continue, subject to the terms and conditions hereinafter set forth, for (i) the duration of the contract between the Government and Lockheed as from time to time extended and for such period after the termination or completion of said contract as Contractor may, in respect of such Employee, deem necessary for the winding up of the operations carried on under said contract after such termination or completion; and (ii) thereafter until return transportation to the United States for such Employee is made available by Contractor or by the Government to Contractor which transportation Contractor shall use its best efforts

to obtain as promptly after the end of the period described in the foregoing clause (i) as is practicable under the circumstances then existing; \* \* \*

The taxpayer remained in the employ of Lockheed stationed in the British Isles and Northern Ireland until July 12, 1944, when he returned to the United States and to the address where he now resides in Los Angeles, California. During the period of taxpayer's absence from the United States, his wife Eleanor remained in the United States with taxpayer's three minor children and lived at the family residence in Los Angeles. (R. 59.)

Taxpayer received as compensation for personal services rendered to Lockheed in the British Isles and Northern Ireland during the year 1943 the sum of \$5,438.50 of which 90 percent was deposited by the corporation to the account of the taxpayer with the California Bank in Los Angeles pursuant to Article 2 of his employment contract. (R. 59-60.)

Taxpayer did not at any time make application to become a citizen of Northern Ireland or a British subject. During the taxable year 1943 he was domiciled in the United States and intended to return to this country as soon as the war in Europe was over. He did not pay any income taxes to the Government of Northern Ireland or the United Kingdom of Great Britain for the year 1943. (R. 60.)

The Tax Court, concluding that the taxpayer during the taxable year 1943 was not "a bona fide resident of a foreign country or countries" within the meaning of Section 116 (a) of the Internal Revenue Code as

amended by Section 148 of the Revenue Act of 1942, determined the deficiency in income tax which is here in controversy.

#### SUMMARY OF ARGUMENT

The taxpayer was not entitled during the taxable year 1943 to the exemption from federal income taxes granted by Section 116 (a) of the Internal Revenue Code as amended by Section 148 of the Revenue Act of 1942. The conclusion of the Tax Court that the taxpayer did not qualify for the exemption because he was not a bona fide resident of the British Isles and Northern Ireland during that year is fully supported by the evidence.

Prior to its amendment by Section 148 of the Revenue Act of 1942, Section 116 (a) of the Internal Revenue Code granted an exemption from federal income taxes with respect to earned income to a United States citizen who was physically absent from the United States for more than six months during the taxable year. The section used the term "bona fide non-resident." The amended section, applicable during the year 1943 accords the exemption only to a citizen "who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year."

The amendment in the Revenue Act of 1942 did not subject to the income tax all United States citizens living abroad but, on the other hand, it did not exempt from the income tax all citizens who were abroad even though they may have been employed in a foreign

country during an entire taxable year. The amendment plainly imposed a new test, bona fide residence in a foreign country. The legislative history of the amended section clearly shows that the new test to be applied is generally the test which has been employed for determining whether an alien is a resident of the United States. That test involves a determination of the intention of the citizen with regard to the length and nature of his stay. The evidence clearly shows that the taxpayer went to the British Isles and Northern Ireland for a definite purpose. It shows that the taxpayer went there for a definite purpose and that he did not intend to remain there more than temporarily. His was no mere floating intention to return to the United States; it was definite and fixed. His sole purpose was to earn money by working there temporarily for his employer. His return transportation was arranged before he left the United States. In the British Isles and Northern Ireland he formed no attachments indicating an intention to remain there indefinitely. He intended at all times to return to this country upon completion of his employment contracts there.

Section 116 (a) as amended was not intended to benefit persons who work only temporarily outside the United States as did the taxpayer. To the contrary we think that the purpose of the amendment in the Revenue Act of 1942 was to subject such persons as the taxpayer to federal income taxes.

## ARGUMENT

**I. The Tax Court was correct in holding that the taxpayer was not a bona fide resident of the British Isles and Northern Ireland during the taxable year 1943**

Section 116 (a) of the Internal Revenue Code, as amended (Appendix, *infra*), grants exemption from federal income taxes to a citizen of the United States with respect to earned income as defined by Section 25 (a) of the Internal Revenue Code (26 U. S. C. 1940 ed., Sec. 25), provided that the citizen "establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year." The only issue presented here is whether the Tax Court erred in its conclusion that the taxpayer was not a bona fide resident of the British Isles and Northern Ireland during the taxable year 1943.

It is generally recognized that "resident" is a word which gains meaning from its context and the legislative purpose for which it is used in a statute. It does not have a fixed meaning which is the same wherever it is used. In some instances the word has a meaning substantially similar to "domicile"; in others it means something less. See *Commissioner v. Swent*, 155 F. 2d 513 (C. C. A. 4th), certiorari denied, 329 U. S. 801; *Hunter v. Bremer*, 256 Pa. 263, 100 Atl. 809. We believe, therefore, that the legislative history of Section 116 (a), as amended, must be examined to ascertain what persons Congress intended to benefit by the section.

It is true that Section 116 (a) of the Internal Revenue Code as originally enacted was designed

to encourage American citizens to go to other countries for commercial and other purposes. House Hearings on Revenue Revision, 1925, pp. 176-185. However, it seems clear that it was the intention of Congress that the tests to be employed in administering Section 116 (a) of the Internal Revenue Code as amended by the Revenue Act of 1942 (Appendix, *infra*) were generally those tests applicable in determining whether an alien is a resident of the United States. *Swenson v. Thomas*, 68 F. Supp. 390, (N. D. Tex.) now on appeal to the Circuit Court of Appeals for the Fifth Circuit; Section 29.211-2 of Treasury Regulations 111 (Appendix, *infra*) which relates to the residential status of aliens in the United States. The Tax Court decided that the taxpayer did not bring himself within the exemption provided by the amended section. (R. 60-68.)

The theme of the taxpayer's brief in this case seems to be that neither the administrators of the tax laws in the Bureau of Internal Revenue nor the courts which have been called upon to construe Section 116 (a) have understood its real purpose and meaning. The taxpayer seems to agree that the tests applied for ascertaining whether an alien is a resident of the United States are relevant here, but he contends that in the instant case they must be applied in proper perspective as to the history, intent and purpose of the statute to the facts at hand. If we understand the taxpayer's position, it is that he has brought himself within the spirit and purpose of the statute, its purpose being to foster foreign trade and commerce.

It is our contention that the Tax Court was correct in its position that the tests to be applied in determining whether a taxpayer was a resident of a foreign country during a taxable year are generally those tests prescribed for determining whether an alien is a resident of the United States. *Johnson v. Commissioner*, 7 T. C. 1040, 1044-1045, Section 29.116-1 of Treasury Regulations 111 (Appendix, *infra*) so provides.

The Tax Court applied those tests in the instant case and concluded that the taxpayer did not qualify for the exemption. Unless the Tax Court made a clearly erroneous finding of ultimate fact after applying these tests, its judgment should be affirmed. If its ultimate finding was clearly erroneous, the judgment should, of course, be reversed or remanded. We think that on the record in this case the conclusion of the Tax Court that the taxpayer was not a bona fide resident of the British Isles and Northern Ireland during the taxable year involved is amply supported.

We are aware that Section 116 (a), as originally enacted, was intended to stimulate foreign trade. The legislative history of the present amended section, which we shall discuss in this brief, discloses, however, that the amended section was not intended to benefit all persons employed outside the United States in commercial activities. The amended section was intended to benefit only a "bona fide resident of a foreign country or countries." The legislative history also shows that the tests to be applied were generally

those tests applied in determining whether an alien is a resident of the United States.

The exemption granted by Section 116 (a) is a matter of legislative grace, there being no question whatever of the power of Congress to tax the income of citizens of the United States wherever it is earned. *Cook v. Tait*, 265 U. S. 47. Statutes which grant exemption from taxation are not to be extended by implication and analogy. *United States v. Stewart*, 311 U. S. 60, 71. Therefore, unless the taxpayer has brought himself squarely within the provisions of Section 116 (a) he is not entitled to the exemption.

**A. Section 116 (a) as originally enacted granted an exemption to a bona fide non-resident of the United States during more than six months of a taxable year**

The exemption granted by Section 116 (a) (Appendix, *infra*) was first written into the tax law in the Revenue Act of 1926, c. 27, 44 Stat. 9, as Section 213 (b) (14). It was extended to a person who was a "bona fide non-resident" of the United States for more than six months during the taxable year. The new provision in that Act was referred to as the "foreign trade exemption" and was intended to stimulate foreign trade by giving to salesmen and traders the same tax advantage provided by other countries. H. Rep. No. 1, 69th Cong., 1st Sess., p. 7 (1939-1 Cum. Bull. (Part 2) 315, 320). The provision as originally written was stricken out by the Senate Committee on Finance, S. Rep. No. 52, 69th Cong., 1st Sess., pp. 20-21 (1939-1 Cum. Bull. (Part 2) 332, 348). It was restored, however, in the Senate. See Conference



Committee Report, H. Conference Rep. No. 356, 69th Cong., 1st Sess., p. 33 (1939-1 Cum. Bull. (Part 2) 361, 364).

The Senate amendment introduced into the language of the section the words "a bona fide non-resident of the United States." The debate of the amendment on the floor of the Senate shows that the exemption was intended to be accorded to persons physically absent from the United States for more than six months of the taxable year. This is shown by a statement on the floor of the Senate by Senator Smoot, Chairman of the Senate Finance Committee, who sponsored the bill in the Senate. Senator McKellar asked whether the amendment affected any of the employees of the Government and Senator Smoot replied (67 Cong. Record, Part 4, p. 3781):

It does, as well as individual citizens. Sometimes their occupations keep them abroad for nine months of the year. *We simply say that if they are out of the United States for six months, then they are to be treated the same as if they lived in a foreign country all the time.* There is no possible objection to it. [Italics supplied.]

In the light of the legislative history of the section the Bureau of Internal Revenue interpreted it to mean that a citizen was entitled to the exemption if he was physically absent from the United States for more than six months of the year. No formal regulations were issued but the Bureau's interpreta-

tion was stated in several rulings. In S. M. 5446, V-1 Cum. Bull. 49 (1926), it was said (pp. 49-50):

This [the legislative history] would indicate that the exemption was intended to be accorded to all citizens of the United States who are actually out of the United States for more than six months during the year and who perform personal services without the United States.

It is the opinion of this office, therefore, that the expression "bona fide nonresident of the United States for more than six months" as used in Section 213 (b) (14) applies to any citizen who is actually without the United States for more than six months during the taxable year \* \* \*

It was also said (p. 49):

The citizen is not required to be a resident of any foreign country; he is only required to be nonresident of the United States for more than six months. The domicile has no bearing on the question.

This interpretation was issued in 1926. Subsequent rulings by the Bureau of Internal Revenue followed this interpretation. See G. C. M. 9848, X-2 Cum. Bull. 178, 179 (1931), and G. C. M. 22065, 1940-1 Cum. Bull. 100.

The Commissioner of Internal Revenue applied this test from 1926 until 1942 when the section was amended. In each succeeding Revenue Act from 1926 to 1942, Congress re-enacted the section in substantially the same language as was contained in Section 213 (b) (14) of the Revenue Act of 1926 (except for

an amendment in the Revenue Act of 1932, which denied the exemption to Government employees).<sup>2</sup> The test applied by the Commissioner has been upheld by the only Circuit Courts of Appeals that have construed the section. *Commissioner v. Fiske's Estate*, 128 F. 2d 487 (C. C. A. 7th), certiorari denied, 317 U. S. 635; *Commissioner v. Swent*, 155 F. 2d 513 (C. C. A. 4th), certiorari denied, 329 U. S. 801;<sup>3</sup> *Swent v. United States*, decided by this Court on July 21, 1947, not yet reported.

<sup>2</sup> Section 116 (a), Revenue Act of 1932, c. 209, 47 Stat. 169.

<sup>3</sup> The Circuit Courts of Appeals in these cases reversed the decisions of the Board of Tax Appeals in *Estate of Fiske v. Commissioner*, 44 B. T. A. 227, and the Tax Court in *Swent v. Commissioner*, 5 T. C. 33.

In *Carstairs v. United States* (E. D. Pa.), decided January 15, 1936 (17 A. F. T. R. 1044), a District Court rejected the Commissioner's interpretation of Section 116 (a). In that case the taxpayer had spent the first seven weeks of the year in the United States and returned to England, where he had long been a resident, for the balance of the year, but died in July. He had thus been a non-resident just short of six months. The Commissioner ruled that he was not entitled to the exemption provided by Section 116 (a), but the District Court ruled that physical absence during six months of the year was not essential in order to qualify for the exemption, stating (p. 1045) :

"But residence means something other than mere physical presence in a particular place. Of course, physical presence for some substantial part of the time is necessary and it may sometimes be a controlling factor (a man who has never been in England cannot have a residence there), but a factor at least equally important is the state of mind of the subject of the inquiry. To ascertain that, his prior and subsequent life is all more or less relevant and for that purpose the evidence offered in this case of the decedent's occupation, ownership of houses, business and customary modes of living dating back to 1905 and appearing in the stipulation, as well as the evidence of the passports and other declarations appearing in the testimony is admitted and considered."

**B. The test to be applied under Section 116 (a) as amended by Section 148 of the Revenue Act of 1942 is generally the test for ascertaining whether an alien is a resident of the United States**

Section 148 of the Revenue Act of 1942 amended Section 116 (a) of the Internal Revenue Code to grant an exemption from federal income taxes to a citizen of the United States who "establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year." The amended section plainly imposed a new test. The emphasis is no longer upon mere non-residence of this country; it is upon residence in a foreign country or countries. The legislative history and the administrative interpretation of the section show clearly that the test to be applied in the administration of the amended section is the test generally applicable for ascertaining whether an alien is a resident of the United States.

The revenue bill passed by the House of Representatives for the year 1942 (H. R. 7378) repealed Section 116 (a). The action was explained by the Ways and Means Committee report, as follows (H. Rep. No. 2333, 77th Cong., 1st Sess., p. 93 (1942-2 Cum. Bull. 372, 412)):

Under Section 116 (a) of the Internal Revenue Code, a citizen of the United States residing outside the United States more than six months during the taxable year is exempt from tax on his earned income from such outside sources, except in case of such income paid by the United States or any of its agencies. The repeal of this provision of the bill will not only serve revenue needs but will also remove

existing unjust discrimination favoring individuals receiving their compensation from non-governmental sources.

After this bill passed the House of Representatives, hearings were held by the Senate Committee on Finance with respect to the repeal of Section 116 (a). We believe that a statement by the Chairman of the Senate Committee on Finance in the course of these hearings is revealing of the intent of the Committee which wrote the 1942 amendment. Senator George stated (Hearings before Committee on Finance, United States Senate, on H. R. 7378, 77th Cong., 2d Sess., Vol. 1, p. 743) :

Maybe we might shorten your testimony here on this point with this statement; I think it is recognized that the complete elimination of Section 116 (a) was not really intended, that it was not the primary purpose in the case of the bona fide, non-resident American citizen who established a home and maintains his establishment and is taking on corresponding obligations of the home in any foreign country, but there is some need for treatment of this section, so that the technicians, American citizens who are merely temporarily away from home could be properly reached and properly dealt with for taxation purposes.

I make this statement to you in the beginning in the hope that it might relieve some of the burden from you. \* \* \*

Basically, it was this policy which the Senate Committee in its report recommended for adoption and the language which it inserted in the bill to put the

policy into effect was enacted. Clearly, the taxpayer in the instant case is not one "who established a home and maintains his establishment and is taking on corresponding obligations of the home in any foreign country." He plainly fits into the pattern of the "technicians, American citizens who are merely temporarily away from home." Senator George stated that it was these persons that the Senate proposed to tax.

In the bill reported by the Senate Committee on Finance was inserted the provision which was subsequently enacted. It provided that the exemption should be extended to a citizen who "establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year." The Senate provision was explained in S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 54-55 (1942—2 Cum. Bull. 504, 548-549).

The detailed discussion of the technical provisions of the bill is in S. Rep. No. 1631, 77th Cong., 2d Sess., p. 116 (1942—2 Cum. Bull. 504, 591):

*Section 150. Income From Sources Without  
United States in Certain Cases*

Section 134 of the House bill, which corresponds to this section, would repeal subsection (a) of section 116 of the Code under which a citizen of the United States, bona fide non-resident of the United States, for more than six months during the taxable year, was exempt from tax on earned income from sources without the United States.

In lieu of the repeal of this section, your committee recommends that subsection (a) be

amended so as to change the test there provided to one of residence in a foreign country or countries during the entire taxable year. In the application of such provision, the tests as to whether a taxpayer is a resident of a foreign country or countries will be those generally applicable in ascertaining whether an alien is a resident of the United States. Vacation or business trips to the United States during the taxable year will not necessarily deprive a taxpayer, otherwise qualified, of the exemption provided by this section. This amendment is applicable to taxable years beginning after December 31, 1942, and the present law is retained for taxable years beginning prior to January 1, 1943.

In addition, subsection (a) of section 116 is amended so that a citizen of the United States, who has been a resident of a foreign country or countries for at least two years before the date on which he changes his foreign residence to a United States residence, shall be exempt with respect to earned income from sources without the United States derived during the period of his foreign residence. This amendment shall be applicable to taxable years beginning in 1942.

The House receded from its position and the Senate amendment was accepted. H. Conference Rep. No. 2586, 77th Cong., 2d Sess., p. 44 (1942-2 Cum. Bull. 701, 708).

These excerpts from the House and Senate Committee reports are significant indications of legislative intent. They contain no suggestion whatever that the section is to be applied in a "perspective" of protec-

tion of international trade and commerce which would benefit all employees of American business concerns who work an entire year outside the United States. To the contrary, the Senate report shows an intention to extend the exemption only to those who establish that they are bona fide residents of a foreign country. And the report does not stop there. It says who will be considered bona fide residents of a foreign country. In lieu of repeal of the section the Committee recommended that it be "amended so as to *change the test* there provided to one of residence in a foreign country or countries during the entire taxable year." (Italics supplied.) It further stated that "the tests as to whether a taxpayer is a resident of a foreign country or countries *will be those generally applicable in ascertaining whether an alien is a resident of the United States.*" [Italics supplied.] The only fair implication of the Committee's language is that those who do not meet the tests are not to be considered bona fide residents, regardless of how important their work may be to the promotion of trade and commerce. If its intention had been different, we submit the Senate Committee would have said so.

We think that the Senate Committee meant simply what it said when it stated that the test was to be changed by the amended section and that the applicable tests shall be the tests for determining whether an alien is a resident of the United States. The tests applicable to aliens involve concepts with which the Senate Committee was thoroughly familiar. Since the enactment of the first income tax provisions in



the Revenue Act of 1913, Congress has differentiated between resident and non-resident aliens.<sup>4</sup> Regulations have been in effect ever since the issuance of regulations under the Revenue Act of 1921,<sup>5</sup> which prescribed tests for determining the residential status of aliens in language substantially similar to that contained in the regulations in effect in 1942 when Section 116 (a) was amended. These regulations had been applied administratively and had been interpreted by the courts. The Senate Committee presumably understood the implications of the recommendations set forth in its report.

Following the interpretation stated in the Senate report, Section 29.116-1 of Treasury Regulations 111 was promulgated. It contains this sentence:

Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principles of sections 29.211-2, 29.211-3, 29.211-4, and 29.211-5 relating to what constitutes residence or non-residence, as the case may be, in the United States in the case of an alien individual.

The Tax Court has decided a large number of cases within the past few months with respect to the exemption granted by Section 116 (a). In each of these cases, the Tax Court has applied the tests employed for determining whether an alien is a

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<sup>4</sup> Revenue Act of 1913, c. 16, 38 Stat. 114, Sec. II.

<sup>5</sup> See Article 311, Treasury Regulations 62, promulgated under the Revenue Act of 1921. See *Bowring v. Bowers*, 24 F. 2d 918 (C. C. A. 2d), for a discussion of the early statutory provisions and regulations with respect to the residential status of aliens.

resident of the United States. *Johnson v. Commissioner*, 7 T. C. 1040; *Hoofnagel v. Commissioner*, 7 T. C. No. 1136 (now pending on petition for review in this Court, No. 11593); *Love v. Commissioner*, 8 T. C. 400; *Bouldin v. Commissioner*, 8 T. C. 110 (decided May 6, 1947); *Nesland v. Commissioner*, decided October 28, 1946 (1946 P-H T. C. Memorandum Decisions, par. 46,255); *Beauchamp v. Commissioner*, decided April 10, 1947 (1947 P-H T. C. Memorandum Decisions Service, par. 47,088); *Massaro v. Commissioner*, decided April 9, 1947 (1947 P-H T. C. Memorandum Decisions Service, par. 47,084).

The District Court in *Swenson v. Thomas*, 68 F. Supp. 390, *supra*, applied the same tests.

We submit that the Tax Court here has applied the correct rule of law and that the ultimate finding of fact that the taxpayer was not a bona fide resident of the British Isles and Northern Ireland during the year 1943 should not be disturbed if supported by the evidence. As hereinafter pointed out, the evidence adequately supports this conclusion.

## **II. The evidence supports the finding of the Tax Court that the taxpayer was not a bona fide resident of the British Isles and Northern Ireland during the taxable year 1943**

The Treasury Regulations relating to aliens are designed for determining whether an alien is a resident of the United States whereas our problem in this case is to determine whether a United States citizen is a resident of a foreign country. It is, therefore, necessary to apply the regulations in reverse in order to obtain the desired determination under Section 116 (a) as amended.

The most important tests applied in determining whether an alien is a resident of the United States are set forth in Section 29.211-2 (Appendix, *infra*).

Applying this regulation under Section 116 (a) as amended, a United States citizen actually present in a foreign country who is not a transient or sojourner is a resident of such foreign country for the purposes of the income tax. We do not deny that the taxpayer was physically present in the British Isles and Northern Ireland during the year 1943. We content, however, that he was a "transient or sojourner" in the British Isles and Northern Ireland during that year.

The regulation specifically states that "whether he is a transient is determined by his intentions with regard to the length and nature of his stay." A person is a resident of a foreign country (1) if he has a mere floating intention, indefinite as to time, to return to the United States, (2) if he lives in a foreign country and has no definite intention as to his stay, and (3) if his purpose is of such a nature that an extended stay may be necessary for its accomplishment *and* to that end he makes his home there temporarily even though he may intend to return to his domicile in the United States when the purpose for which he came has been consummated or abandoned. If a person does not meet these tests he is a transient or sojourner. The regulations specifically say that if a person goes to a foreign country for a definite purpose which in its nature may be promptly accomplished, he is a transient.

It cannot be said that the taxpayer in the instant case had no "definite intention as to his stay" or

that he had a “mere floating intention, indefinite as to time” to return to the United States. He went to the British Isles and Northern Ireland for only one purpose—to make money by carrying out his contract with his employer. No other purpose is suggested by any of the evidence. When his work for his employer was completed it was his obvious intention to return to the United States. His contract with his employer provided for his return transportation to the United States. (R. 56, 59.)

The taxpayer was admitted to the British Isles on a visa as an employee of the Lockheed. Under British law this visa only permitted the taxpayer to remain within the British Isles for the purpose for which it was given, and if and when Lockheed terminated its work in the British Isles the taxpayer was expected to depart within a reasonable time and return to the United States. (R. 58.) Assuredly it may be said that the taxpayer definitely intended not to stay in the British Isles and Northern Ireland more than temporarily.

Every circumstance with respect to the taxpayer’s stay in the British Isles and Northern Ireland indicates that he planned to be there only temporarily and that he intended to return to the United States and the family residence in Los Angeles, where his wife and three minor children resided. (R. 59.) The taxpayer made no application to become a citizen of Northern Ireland or a British subject. (R. 60.) He paid no income taxes to the government of Northern Ireland or the United Kingdom of Great Britain for the year 1943. (R. 60.) The taxpayer did not know

where or for how long he was going to be stationed in one place after he was assigned to work there. (R. 20, 25.) He was subject to being shifted from one place to another upon short notice. (R. 20, 25.) His living quarters and meals were provided by his employer and he had agreed to accept the accommodations provided. (R. 25-26.) The purely temporary character of his stay in the British Isles and Northern Ireland is demonstrated by the fact that 90% of his compensation was deposited to his credit by his employer with the California Bank in Los Angeles pursuant to Article 2 of the employment contract. (R. 60.)

The foregoing facts demonstrate plainly that the taxpayer was not a bona fide resident of the British Isles and Northern Ireland during the year 1943. We submit that he is not one of those persons "who established a home and maintains his establishment and is taking on corresponding obligations of the home in any foreign country" and for whom Senator George stated in the Senate hearings, *supra*, the exemption provided by Section 116 (a) was to be preserved. The taxpayer does not meet the tests laid down in the regulations relating to the residential status of aliens.

We do not contend that abandonment of a citizen's domicile in the United States is essential in order to qualify for the exemption granted by Section 116 (a). Domicile and residence are not synonymous under the provisions of the income tax law relating to the residence of aliens (*Bowring v. Bowers*, 24 F. 2d 918 (C. C. A. 2d)), and are not synonymous with respect to Section 116 (a). We believe, however, that the tax-

payer's intention in the instant case to return to the United States (R. 85) supports the court's conclusion that the taxpayer was not a resident of the British Isles and Northern Ireland.

In *Ingram v. Bowers*, 47 F. 2d 925 (S. D. N. Y.), affirmed on another point, 57 F. 2d 65 (C. C. A. 2d), the issue was whether Enrico Caruso was a resident or non-resident alien for income tax purposes. The evidence disclosed that he was born in Italy and always remained a subject of that country. For many years prior to his death in 1921 he spent about six months of each year in the United States. At the close of the operatic season he usually returned to Italy where he maintained an estate. His headquarters in the United States were at two hotels in New York. He married an American girl in 1918 and in 1919 a daughter was born in this country. His income in this country was substantial. The court found that he was not a resident of the United States, stating (p. 926):

But I have no doubt that his status was that of a nonresident. *His original residence was in Italy, and there is no satisfactory evidence of an intention to abandon that residence.* His stays in the United States were transitory and, except for one or two occasions, were only for the purpose of fulfilling operatic and concert engagements. Granting that domicile and residence are not synonymous under the income tax statutes \* \* \*, I am persuaded that Caruso's residence as well as domicile was in Italy. \* \* \* [Italics supplied.]

Section 116 (a) of the Internal Revenue Code, as amended by Section 148 of the Revenue Act of 1942, does not provide that the mere absence of a United States citizen from the country for an entire taxable year brings the exemption into operation. Neither the language nor the legislative history of the section, when viewed in the light of the statements made by the Chairman of the Senate Committee on Finance and the statements in the report of the Senate Committee on Finance which wrote the amended section supports such a construction. The taxpayer nevertheless argues (Br. 12) that Congress intended that Section 116 (a) of the Internal Revenue Code, as amended, "should have a liberal and not a narrow and restricted meaning", and so seeks to bring himself within the intendment of the exemption provision. This, we do not concede, but even if it were true we do not think it would be enough to qualify the taxpayer for the exemption. Exemptions are not based upon inferences. *Pacific Co. v. Johnson*, 285 U. S. 480. Exemption statutes are not to be extended by implication and analogy. *United States v. Stewart*, 311 U. S. 60, 71.

We think that the taxpayer has failed to show that his case falls within the provisions of Section 116 (a) as amended. We think he is one of that class of persons, "technicians, American citizens who are merely temporarily away from home", who, Senator George at the Senate Hearings on the amendment, *supra*, stated, should be reached and properly dealt with for taxation purposes. The taxpayer plainly

does not come within the exemption requirements of the regulations relating to the residence of aliens which the Senate Committee report stated should be the criterion for administering the section.

The taxpayer seeks to distinguish the case of *Johnson v. Commissioner*, 7 T. C. 1040, on the ground that in that case Denmark had ceded to the United States exclusive jurisdiction over American citizens temporarily in Greenland under much the same circumstances as the taxpayer was present in the British Isles and Northern Ireland. The distinction sought to be made does not appear to be substantial. The taxpayer in the *Johnson* case was not required to pay Danish income taxes upon his compensation, and the taxpayer in the instant case, as a matter of fact, did not pay income taxes on account of his compensation to the government of Northern Ireland or to the United Kingdom of Great Britain for the taxable year involved. (R. 60.) Moreover, it does not appear that this slight factual difference furnishes any reliable aid to the question of statutory construction which was presented in the *Johnson* case and which is presented here.

#### CONCLUSION

The decision of the Tax Court should be affirmed.

Respectfully submitted,

Theron L. Caudle,  
*Assistant Attorney General.*

Sewall Key,  
Berryman Green,

*Special Assistants to the Attorney General.*

AUGUST 1947.



## APPENDIX

### Internal Revenue Code:

SEC. 116 [as amended by the Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 148 (a)]. EXCLUSIONS FROM GROSS INCOME.

In addition to the items specified in section 22 (b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) *Earned Income from Sources Without the United States.*—

(1) *Foreign Resident for Entire Taxable Year.*—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25 (a) if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

(2) *Taxable Year of Change of Residence to United States.*—In the case of an individual citizen of the United States, who has been a bona fide resident of a foreign country or countries for a period of at least two years before the date on which he changes his residence from such country to the United States, amounts received from sources without the United States (except amounts paid by the United

States or any agency thereof), which are attributable to that part of such period of foreign residence before such date, if such amounts would constitute earned income as defined in section 25 (a) if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

\* \* \* \* \*

(26 U. S. C. 1940 ed., Sec. 116.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.116-1.<sup>6</sup> *Earned Income From Sources Without the United States.*—For taxable years beginning after December 31, 1942, there is excluded from gross income earned income in the case of an individual citizen of the United States provided the following conditions are met by the taxpayer claiming such exclusion from his gross income: (a) It is established to the satisfaction of the Commissioner that the taxpayer has been a bona fide resident of a foreign country or countries throughout the entire taxable year; (b) such income is from sources without the United States; (c) the income constitutes earned income as defined in section 25 (a) if received from sources within the United States; and (d) such income does not represent amounts paid by the United States or any agency or instrumentality thereof. Hence, a citizen of the United States taking up residence without the United States in the course of the taxable year is not entitled to such exemption for such taxable year. However, once bona fide residence in a foreign

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<sup>6</sup> This section was amended by T. D. 5373, 1944 Cum. Bull. 143, in respects not material to the instant case.

country or countries has been established, temporary absence therefrom in the United States on vacation or business trips will not necessarily deprive such individual of his status as a bona fide resident of a foreign country. Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principles of sections 29.211-2, 29.211-3, 29.211-4, and 29.211-5 relating to what constitutes residence or nonresidence, as the case may be, in the United States in the case of an alien individual.

\* \* \* \* \*

SEC. 29.211-2. *Definition.*—A “nonresident alien individual” means an individual—

(a) Whose residence is not within the United States; and

(b) Who is not a citizen of the United States. The term includes a nonresident alien fiduciary.

An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or

abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

\* \* \* \* \*

SEC. 29.211-4. *Proof of Residence of Alien.*—The following rules of evidence shall govern in determining whether or not an alien within the United States has acquired residence therein within the meaning of chapter 1. An alien, by reason of his alienage, is presumed to be a nonresident alien. Such presumption may be overcome—

(1) In the case of an alien who presents himself for determination of tax liability prior to departure for his native country, by (a) proof that the alien, at least six months prior to the date he so presents himself, has filed a declaration of his intention to become a citizen of the United States under the naturalization laws, (b) proof that the alien, at least six months prior to the date he so presents himself, has filed Form 1078 or its equivalent, or (c) proof of acts and statements of the alien showing a definite intention to acquire residence in the United States or showing that his stay in the United States has been of such an extended nature as to constitute him a resident;

(2) In other cases by (a) proof that the alien has filed a declaration of his intention to become a citizen of the United States under the naturalization laws, (b) proof that the alien has filed Form 1078 or its equivalent, or (c) proof of acts and statements of an alien showing a definite intention to acquire residence in the United States or showing that his stay in the United States has been of such an extended nature as to constitute him a resident.

In any case in which an alien seeks to over-

come the presumption of nonresidence under (1) (c) or (2) (c), if the internal-revenue officer who examines the alien is in doubt as to the facts, such officer may, to assist him in determining the facts, require an affidavit or affidavits setting forth the facts relied upon, executed by some credible person or persons, other than the alien and members of his family, who have known the alien at least six months prior to the date of execution of the affidavit or affidavits.

SEC. 29.211-5. *Loss of Residence by Alien.*—An alien who has acquired residence in the United States retains his status as a resident until he abandons the same and actually departs from the United States. An intention to change his residence does not change his status as a resident alien to that of a nonresident alien. Thus, an alien who has acquired a residence in the United States is taxable as a resident for the remainder of his stay in the United States.



No. 11578.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

MICHAEL DOWNS,

*Petitioner,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

---

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX  
COURT OF THE UNITED STATES.

---

REPLY BRIEF FOR PETITIONER.

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FILED

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PAUL P. O'BRIEN,





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ON PETITION FOR REVIEW OF THE DECISION OF THE TAX  
COURT OF THE UNITED STATES.

---

**Preliminary Statement.**

It will be the purpose of petitioner herein to reply to the points in respondent's brief as nearly as possible in the order in which they are therein made.

**ARGUMENT.**

**I.**

**Petitioner Agrees With Respondent That the Term  
Resident as Used in Sec. 116(a) Is Defined in  
Reg. 111, Sec. 29.211-2.**

We are pleased to see that at the very beginning of his argument (his page 12) respondent agrees that the test to be employed in administering Section 116(a) of the In-

ternal Revenue Code as amended by the Revenue Act of 1942 [Appendix] are generally those tests employed in determining whether an alien is a resident of the United States, namely, Section 29.211-2 of Treasury Regulations 111 [see Appendix].

There can be no doubt that this was the intention of Congress for in the 1942 Senate amendment to Sec. 116(a), I. R. C., accepted by Conference Committee of Senate and House, this identical language was employed, namely, that "the tests as to whether a taxpayer is a resident of a foreign country or countries will be those generally applicable in ascertaining whether an alien is a resident of the United States."

It is indeed fortunate that we have this clarification of the meaning of the word "resident" as used in this taxing statute for the term certainly has many and varied meanings as noted in *Commissioner of Internal Revenue v. Swent*, 155 F. (2d) 513, cited by both petitioner and respondent.

And even in our Federal tax statutes the term resident is used with wide and different meanings, as noted in *Bowring v. Bowers*, 24 F. (2d) 918, cited by respondent at his page 23:

"The U. S. Income Tax Acts from the Act of 1913 on, have been uniform in levying a tax on the entire income of aliens, if resident here, and residence has been construed by the Commissioner in all his ruling as something which may be less than a domicile, which fixes the law of devolution of property and determines the incidence of estate and succession taxes. It is true that 'residence' is ordinarily used as the equivalent of domicile in statutes relating to probate, administration and succession taxes. So, as might be ex-

pected, in the Revenue Acts, the word 'residence' when employed in the portions of the Act dealing with the Estate Tax law, means 'domiciled' and has been so construed by the practice and regulations of the Department."

It is rather amusing to find respondent stressing the point at the end of (I) of his brief that exemptions are a matter of legislative grace, 'for under subhead (A) of (I) we find him liberal to the point of laxity in the administration of what he so fondly refers to as the "foreign trade exemption." We do not question the principle that the law as to exemptions should be strictly construed but we submit that the balanced scale of justice should not be too heavily handicapped by the mind of the Commissioner as he swings from his administration of the "foreign trade exemption" to what he might well call the "technician" or "Senator George" amendment, effective in 1943. More as to this in subheads A and B of this brief.

**A. Sec. 116(a) I. R. C. as Amended in 1926 Granting Exemption to a Bona Fide Non-resident of the United States During More Than Six Months of a Taxable Year Was Administered as Though the Words Bona Fide Were Missing and Non-resident Meant Absentee.**

Respondent omitted the following interesting language from his citation of *Carstairs v. United States*, 17 A. F. T. R. 1044 (page 17, his brief) :

"If, as defendant contends, the Committee Report shows that this clause was inserted in relief of salesmen and foreign representatives of American firms, traveling abroad solely for the purposes of their business, it is difficult to see why the statute did not say so, instead of carefully specifying '*bona fide*' non-resi-

dents, thus excluding by omission residents of this country abroad for a specific and temporary purpose and accomplishing a result the opposite of that which defendant says was intended.”

In petitioner’s opening brief at page 12, we cited *Commissioner of Internal Revenue v. Fiske’s Estate*, 128 F. (2d) 487, where the Court said, in part:

“In construing the phrase ‘bona fide nonresident of the United States for more than six months during the taxable year,’ the Bureau of Internal Revenue has interpreted it as applying to any American citizen actually outside the United States for more than six months during the taxable year, and this construction finds support in the legislative history of the act.”

It was apparently this lack of any attention paid to the question of “*bona fide*” non-residence that led the Senate Committee on Finance, C. B. 1942, pages 548, 549, to report:

“. . . This provision of the present law has suffered considerable abuse, in the case of persons absenting themselves from the United States for more than six months simply for tax-evasion purposes.”

It will be noted that the Court above said that the Bureau of Internal Revenue had interpreted the phrase “*bona fide* non-resident” as applying to any American citizen actually outside the United States for more than six months during the taxable year. Apparently there was no effort on the part of respondent to tax those persons whom the Senate Committee say absented themselves from the United States for tax-evasion purposes. Respondent apparently did not then feel, as he asserts now, that the exemption granted by Sec. 116(a) is a matter of legislative grace.

Nothing better illustrates the kind of legislative and administrative shell and pea game that respondent would invoke, than the treatment of taxpayer in the case at bar.

Michael Downs is exempted from his overseas income tax for the last half of 1942 on the grounds that he was then a *bona fide* non-resident of the United States. But one instant after midnight, December 31, 1942, respondent would say of him, as he does at page 29 of his Brief:

“We think he is one of that class of persons, ‘technicians, American citizens who are merely temporarily away from home,’ who, Senator George at the Senate Hearings on the amendment, *supra*, stated, should be reached and properly dealt with for taxation purposes.”

**B. The Test to be Applied Under Section 116(a) as Amended by Section 148 of the Revenue Act of 1942 Is Generally the Test for Ascertaining Whether an Alien Is a Resident of the United States.**

The above caption is the same as that used in heading (B) of his Brief. And we agree with respondent when he states at page 25 of his Brief that the most important tests applied in determining whether an alien is a resident of the United States are set forth in Sec. 29.211-2 of Regulations 111 [Appendix]. But we call this Court's attention to the fact that respondent is not warranted in repeatedly readings into this law by juxta position the remarks of Senator George at a hearing of the Senate Finance Committee when he was aiming to shorten the testimony of a witness before the Committee (page 19 of respondent's brief). These remarks are certainly not a part of the law and not remotely made so. They are offensive and unfair and made most untimely.

These remarks were untimely because at the very time they were made our country desperately needed these technical men overseas. As set forth in petitioner's statement of facts his opening Brief, these 3,000 Lockheed men were the pick of the mechanical and technical genius of our country, recruited from engine factories and watch plants all over the United States, but mainly from airplane factories on the Pacific Coast.

General (Hap) Arnold needed the men quickly and badly and telegraphed to practically all manufacturers in the United States to release such personnel as Lockheed Overseas Corporation needed.

The Germans were far ahead of us in airplane development. We were just beginning. They had had combat experience. We none. We needed skilled men, many of them, near the scene of action to modify our planes as our young fliers proved we needed such. Hap Arnold did not have the time or equipment to train new recruits to develop the needed modification organization. So Lockheed was assigned this big and most important task. These technicians were men who had had months and often years of the needed training. If Sec. 116(a) as it stood through 1942 was intended as respondent says with approval at page 14 of his brief, "to stimulate foreign trade by giving to salesmen and traders the same tax advantage provided by other countries;" then why does he twist the law against these technicians who did so much to save this same American trade (and ourselves as we have already said).

The Tax Court decisions cited at top of page 24 of respondent's Brief merely are in line with the decision here on appeal and its companion case herein, that of *J. Gerber Hoofnel v. Commissioner*, No. 11593, in this Court.



II.

The Evidence Supports Petitioner's Claim That He Was a Bona Fide Resident of Great Britain and North Ireland During the Taxable Year Within the Meaning of Sec. 116(a), I. R. C., as Defined by Regulations 111, Sec. 29.211-2.

Sec. 29.211-2, *supra*, reads as follows:

"An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances."

Respondent Commissioner of Internal Revenue, and the Tax Court agree that the above Section applies in reverse

to a citizen of the United States abroad for the entire taxable year. So applying it we submit [R. 82-85]:

Downs was not a mere transient or sojourner in Great Britain and North Ireland. He went there under contract with Lockheed Overseas Corporation to stay for the duration of the war and such additional time as necessary for Lockheed to perform its contract with the Army. Neither he nor anyone else knew in 1943 how long this might be or whether he would ever return. He could not for this reason have any intention with regard to the length and nature of his stay. He agreed in his contract to go wherever the Army and Lockheed might send him. He had a mere floating intention, indefinite as to time, to return to the United States which, as the definition says, was not sufficient to make him a transient. He lived in Great Britain and North Ireland and had no definite intention as to his stay (and could have no definite intention as to his stay during the war condition of 1943) and this the definition says made him a resident.

He did not go to Great Britain and Ireland for a definite purpose which in its nature might be promptly accomplished; but his purpose was of such a nature that an extended stay might be necessary for its accomplishment, and to that end he made his home *temporarily* over there; he therefore became a resident, though it was his intention at all times to return to his domicile in the United States when the purpose for which he went overseas had been consummated or abandoned.

The above is an accurate and full paraphrase of Sec. 29.211-2 as it relates to Michael Downs.

Nowhere in the record is there any evidence to justify respondent in alleging as he does, at the top of page 26 of his Brief, that Downs went to the British Isles and North Ireland for only one purpose—to make money by carrying out his contract with his employer.

We submit that what we have said heretofore herein and what we have said in our opening brief sufficiently answers page 26 and any following pages of respondent's Brief.

### Conclusion.

The decision of the Tax should be reversed.

Respectfully submitted,

ROBERT A. WARING,  
*Attorney for Petitioner.*

September 3, 1947.





table to that part of such period of foreign residence before such date, if such amounts would constitute earned income as defined in section 25 (a) if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

\* \* \* \* \*

(26 U. S. C. 1940 ed., Sec. 116.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.116-1.<sup>6</sup> *Earned Income From Sources Without the United States.*—For taxable years beginning after December 31, 1942, there is excluded from gross income earned income in the case of an individual citizen of the United States provided the following conditions are met by the taxpayer claiming such exclusion from his gross income: (a) It is established to the satisfaction of the Commissioner that the taxpayer has been a *bona fide* resident of a foreign country or countries throughout the entire taxable year; (b) such income is from sources without the United States; (c) the income constitutes earned income as defined in section 25 (a) if received from sources within the United States; and (d) such income does not represent amounts paid by the United States or any agency or instrumentality thereof. Hence, a citizen of the United States taking up residence without the United States in the course of the taxable year is not entitled to such exemption

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<sup>6</sup>This section was amended by T. D. 5373, 1944 Cum. Bull. 143, in respects not material to the instant case.

for such taxable year. However, once *bona fide* residence in a foreign country or countries has been established, temporary absence therefrom in the United States on vacation or business trips will not necessarily deprive such individual of his status as a *bona fide* resident of a foreign country. Whether the individual citizen of the United States is a *bona fide* resident of a foreign country shall be determined in general by the application of the principles of sections 29.211-2, 29.211-3, 29.211-4, and 29.211-5 relating to what constitutes residence or nonresidence, as the case may be, in the United States in the case of an alien individual.

\* \* \* \* \*

SEC. 29.211-2. Definition.—A “nonresident alien individual” means an individual—

- (a) Whose residence is not within the United States;
- (b) Who is not a citizen of the United States. The term includes a nonresident alien fiduciary.

An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident,

though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

\* \* \* \* \*

SEC. 29.211-4. *Proof of Residence of Alien.*—The following rules of evidence shall govern in determining whether or not an alien within the United States has acquired residence therein within the meaning of chapter 1. An alien, by reason of his alienage, is presumed to be a non-resident alien. Such presumption may be overcome—

(1) In the case of an alien who presents himself for determination of tax liability prior to departure for his native country, by (a) proof that the alien, at least six months prior to the date he so presents himself, has filed a declaration of his intention to become a citizen of the United States under the naturalization laws, (b) proof that the alien, at least six months prior to the date he so presents himself, has filed Form 1078 or its equivalent, or (c) proof of acts and statements of the alien showing a definite intention to acquire residence in the United States or showing that his stay in the United States has been of such an extended nature as to constitute him a resident;

(2) In other cases by (a) proof that the alien has filed a declaration of his intention to become a citizen of the United States under the naturalization laws, (b) proof that the alien has filed Form 1078 or its equivalent, or (c) proof of acts and statements of an alien showing a definite intention to acquire residence in the United States or show-



ing that his stay in the United States has been of such an extended nature as to constitute him a resident.

In any case in which an alien seeks to overcome the presumption of nonresidence under (1) (c) or (2) (c), if the internal-revenue officer who examines the alien is in doubt as to the facts, such officer may, to assist him in determining the facts, require an affidavit or affidavits setting forth the facts relied upon, executed by some credible person or persons, other than the alien and members of his family, who have known the alien at least six months prior to the date of execution of the affidavit or affidavits.

SEC. 29.211-5. *Loss of Residence by Alien.*—An alien who has acquired residence in the United States retains his status as a resident until he abandons the same and actually departs from the United States. An intention to change his residence does not change his status as a resident alien to that of a nonresident alien. Thus, an alien who has acquired a residence in the United States is taxable as a resident for the remainder of his stay in the United States.



No. 11581

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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JAMES A. DAGGS,

Appellant,

vs.

GROVER C. KLEIN, Rear Admiral, United States  
Navy, Commandant, Mare Island Navy Yard  
and JAMES V. FORRESTAL, Secretary of  
the Navy,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division



No. 11581

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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JAMES A. DAGGS,

Appellant,

vs.

GROVER C. KLEIN, Rear Admiral, United States  
Navy, Commandant, Mare Island Navy Yard  
and JAMES V. FORRESTAL, Secretary of  
the Navy,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

MESSRS. GLADSTEIN, ANDERSEN, RESNER  
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240 Montgomery Street,  
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Attorneys for Plaintiff and Appellant.

MR. FRANK J. HENNESSY,

United States Attorney,  
Northern District of California.  
Post Office Building,  
San Francisco, California.

Attorney for Defendants and Appellees.

In the United States District Court for the Northern  
District of California, Southern Division

No. 25927 S

JAMES A. DAGGS,

Plaintiff,

vs.

GROVER C. KLEIN, Rear Admiral, United States  
Navy, Commandant Mare Island Navy Yard;  
JAMES V. FORRESTAL, Secretary of the  
Navy,

Defendants.

COMPLAINT FOR REINSTATEMENT OF  
CIVIL SERVICE EMPLOYEE AND FOR  
COMPENSATION

Plaintiff complains of the defendants above named  
and for cause of action against said defendants al-  
leges:

I.

The matter in controversy exceeds, exclusive of  
costs or interest, the sum of three thousand dollars  
(\$3,000) and arises under the Constitution and Laws  
of the United States.

II.

That during all of the times herein mentioned  
plaintiff was and now is a citizen of the United  
States, being born in [1\*] Allendale, State of Illi-  
nois, on the 7th day of March, 1889, and now resid-

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\* Page numbering appearing at foot of page of original certified  
Transcript of Record.

ing in the City of Vallejo, County of Solano, State of California.

### III.

That during all times herein mentioned plaintiff was and now is a member of the Free and Accepted Masons, and at the time of his removal as hereinafter set forth plaintiff was a member of the United Federal Workers of America, Congress of Industrial Organizations.

### IV.

That from November 6, 1926, until being discharged in June, 1941, plaintiff was a Federal Civil Service employee at the Mare Island Navy Yard, located at Mare Island, California, commencing as a second class machinist and at the time of discharge, as hereinafter set forth, was serving as first class machinist, receiving \$8.96 pay per day.

### V.

That defendant Grover C. Klein, Rear Admiral, United States Navy, now is the duly appointed and acting Commandant of the Mare Island Navy Yard, succeeding W. L. Friedell, Rear Admiral, United States Navy, as said Commandant; that during all times mentioned herein said defendant Klein and said Friedell were acting with the knowledge and approval of the Secretary of the Navy.

### VI.

That defendant James V. Forrestal is the duly appointed and acting Secretary of the Navy of the United States.

## VII.

That on the 28th day of June, 1940, the Congress of the United States passed the Act of June 28, 1940, Public Law Number 671, 76th Congress, 54 Stat. 676, Tit. 50 U.S.C.A. App. Sec. 1156, providing in part as follows: [2]

Provided further, That during the national emergency declared by the President on September 8, 1939, to exist, the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555; 5 U.S.C. Sec. 652), shall not apply to any civil service employee of the War or Navy Departments or of the Coast Guard, or their field services, whose immediate removal is, in the opinion of the Secretary concerned warranted by the demands of national security, but nothing herein shall be construed to repeal, modify, or suspend the proviso in that section. Those persons summarily removed under the authority of this section may, if in the opinion of the Secretary concerned, subsequent investigation so warrants, be reinstated, and if so reinstated shall be allowed compensation for the period of such removal at the rate they were receiving on the date of removal. And provided, further, That within thirty days after such removal any such person shall have an opportunity personally to appear before the official designated by the Secretary concerned and be fully informed of the reasons for such removal, and to submit, within thirty days thereafter, such statement

or affidavits, or both, as he may desire to show why he should be retained and not removed.

### VIII.

That on or about the 30th day of June, 1941, plaintiff was discharged from his employment at the Mare Island Navy Yard and was thereafter, on the 24th day of July, 1941, personally informed by said Friedell, then Commandant of said Navy Yard, that the reason for the discharge was as follows:

Since September, 1939, the United States of America has been under a condition of emergency which has now been declared by the President to be unlimited. Under this condition, in spite of the very liberal governmental labor policy in the employment of its citizens, it has been incumbent upon all of its employees so to conduct themselves that there should be not the least concern on the part of their associates or their administrative officials as to their unquestioned adherence to the principles of the government and their loyalty in furthering its defense against enemies within or without.

Despite the constitutional rights of individuals as to freedom of speech and political opinion, these rights are not directly concerned in the right to actual employment in a governmental activity. This, each individual must maintain for himself by the correctness of his attitude and his behaviour.

Mr. Daggs, your discharge was warranted by the demands of national security and was made

from this Navy Yard because a confidential investigation disclosed that you do not possess the requisite degree of loyalty to the United States to remain an employee at this Navy Yard since you have been actively associated with members of and attending meetings of [3] an organization which advocates the overthrow of the constitutional form of government of the United States. You are advised that within thirty days from the date of this interview, Thursday, July 24, 1941, you have the privilege of submitting any statement or affidavit, or both, which you may desire to show why you should be retained and not discharged. These must be submitted in writing.

#### IX.

That thereafter plaintiff informed said Friedell in writing as follows:

In regards to the charges against me from the Navy Yard, here is my statement.

I went to work on the Navy Yard Nov. 6, 1926. In that time I have put in about 13 years. I took an interest in my work and I always call my supervisor's attention to anything that was not right; my supervisor had me inspect the work of the other men when a job was finished.

The last 4 years I have worked from 4 to 12 P.M., and week ends I work on my ranch so I have had no time to associate with members or organizations which would or would not advocate the overthrow of the Constitutional form of Government of the United States.

I only belong to the United Federal Workers of America (C.I.O.) Union, and the Masonic Lodge. If either one of these organizations advocate the overthrow of our form of government I would like to be informed of that. Furthermore I have not attended any meetings of any kind, not even the Union or Masonic Lodge, and whoever investigated me and says that I had been to any meetings or that I am active in any organization or whatever it is I am supposed to have done, I say, "It is a lie," and I would like to meet that person face to face and have them prove when I attended these meetings, and what associations or organizations I belong to outside of the two mentioned.

### X.

That plaintiff has made repeated demands upon defendants and the said Friedell that he be fully informed of the reason for his removal as provided for in said Public Law No. 671 hereinabove set forth, and for reinstatement as a civil service employee at the Mare Island Navy Yard together with compensation for the period of removal as provided for in said Public Law No. 671; that defendants and said Friedell have unlawfully failed and refused to fully inform [4] plaintiff of the reasons for the removal of plaintiff from said employment or to reinstate or compensate plaintiff; that plaintiff has at no time been fully informed of the reasons for his discharge and the only reasons given to plaintiff are those hereinabove specified in the statement made

by Friedell; that said statements were and are too vague and indefinite to enable plaintiff to prepare and submit the statements or affidavits referred to in Public Law 671 to show why plaintiff should be retained and not removed; that plaintiff believes that any further efforts to procure voluntary action on the part of defendants would be useless.

## XI.

That plaintiff was and is entitled to the notice and hearing provided for by Congress in said Public Law No. 671 as a condition precedent to the removal of civil service employees; that the arbitrary and capricious failure and refusal of defendants and Friedell to afford plaintiff the right to the said notice and hearing was and is in excess of the authority vested in defendants and Friedell by Congress and constitutes a violation of said Public Law No. 671 and a violation of the right of plaintiff to due process of law as provided for in the 5th Amendment to the Constitution of the United States.

## XII.

That the only stated ground upon which plaintiff was discharged was that he had been actively associated with members of and attending meetings of an organization which advocates the overthrow of the constitutional form of government of the United States; there was not and is not any charge that the alleged activities of plaintiff evidenced a working alliance with said unnamed organization to bring the said purpose to fruition. In that connection plaintiff alleges that during all times herein mentioned



his entire course of conduct prior to his dismissal was [5] and now is for the attainment of wholly lawful objectives. Plaintiff further alleges that without being informed of the name or identity of the said organization, the ground for the discharge of plaintiff as specified made meaningless and abortive the provision in Public Law No. 671 giving to a discharged person, after being fully informed of the reasons for the removal, the right to file such statements or affidavits, or both, as he may desire to show why he should be retained and not removed, in that without being informed of the name or identity of said organization plaintiff was denied the right to set forth in any statement or affidavit whether he was actively associated with said organization and, if so, whether the organization did espouse the overthrow of the constitutional form of government of the United States and if the organization did espouse such an objective whether the acts of plaintiff evidenced a working alliance with said organization to bring its program to fruition.

### XIII.

That plaintiff is wholly without remedy in the premises and unless this court directs the defendants to reinstate plaintiff with compensation for the period of removal as provided for in Public Law No. 671 that plaintiff will suffer irreparable injury.

### XIV.

That at the time of the removal of plaintiff as aforesaid there was due plaintiff certain accrued leave with pay amounting to approximately one hun-

dred fifty dollars (\$150.00); that defendants have failed and refused to pay said amount or any part thereof to plaintiff.

Wherefore, plaintiff prays judgment:

1. That defendants be ordered forthwith to reinstate plaintiff as a civil service employee at the Mare Island Navy [6] Yard in the same capacity in which plaintiff was working at the time of his discharge.

2. That defendants be ordered to compensate plaintiff for the period of his removal at the rate of pay plaintiff was receiving on the date of his discharge.

3. That defendants be ordered to reinstate the right of plaintiff to accrued leave with pay as the same existed on the date of discharge.

4. For such other and further relief as the court may deem proper in the premises.

GLADSTEIN, ANDERSEN,  
RESNER, SAWYER & EDISES.

/s/ By HERBERT RESNER

And

/s/ MYER C. SYMONDS,

Attorneys for Plaintiff. [7]

State of California,

City and County of San Francisco—ss.

James A. Daggs, being first duly sworn, deposes and says:

That he is the plaintiff named in the within action; that he has read the foregoing complaint and

knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters that he believes it to be true.

JAMES A. DAGGS.

Subscribed and sworn to before me this 29th day of April, 1946.

[Seal]     /s/ ALICE C. MORSE,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed May 6, 1946. [8]

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[Title of Court and Cause.]

### MOTION TO DISMISS

Now comes the defendants James V. Forrestal, Secretary of the Navy, appearing herein specially, and for no other purpose and objecting to the jurisdiction of the Court over him and Grover C. Klein, Rear Admiral United States Navy, Commander, Mare Island Navy Shipyard, by Frank J. Hennessy, United States Attorney, and William E. Licking, Assistant United States Attorney, and move the Court to dismiss this suit on the following grounds:

#### I.

As to the defendant James V. Forrestal, appearing specially, the Court lacks jurisdiction over his person since said defendant has his official residence in the District of Columbia and is not an inhabi-

tant, resident or citizen of California (28 U.S.C. 112) and has not consented to be sued in this Court and does except to the jurisdiction of this Court and to the venue of these proceedings.

## II.

That the Court lacks jurisdiction over the subject matter of the Complaint;

## III.

That the suit is in effect against the United States which has not consented to be sued in such a case;

## IV.

That the Complaint fails to state a cause of action against defendants or any of them on which relief can be granted;

## V.

That the suit may not be maintained in the absence of the principal defendant, James V. Forrestal, Secretary of the Navy, who, because any determination herein will effect his rights, orders and statutory responsibilities and duties, [9] is an indispensable party, who has not been and cannot without his consent be subjected to the jurisdiction of this Court.

Wherefore, defendants pray that said Complaint be dismissed with prejudice.

/s/ FRANK J. HENNESSY,  
United States Attorney.

/s/ WILLIAM E. LICKING,  
Asst. United States Attorney,  
Attorneys for Defendants.

NOTICE OF MOTION

To: Plaintiff above named, and to Messrs. Gladstein, Andersen, Resner, Sawyer & Edises, 250 Montgomery Street, San Francisco, 4, California, his attorney:

Please Take Notice that the undersigned will bring the attached Motion to Dismiss on for hearing before this Court at Room 338 Post Office and Court House Building, City and County of San Francisco, California, on the 16th day of September, 1946; at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

/s/ FRANK J. HENNESSY,  
United States Attorney.

/s/ WILLIAM E. LICKING,  
Asst. United States Attorney,  
Attorneys for Defendants.

[Endorsed]: Filed Sep. 3, 1946. [11]

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[Title of District Court and Cause.]

MEMORANDUM OPINION ON MOTION TO  
DISMISS AND ORDER DISMISSING ACTION

Plaintiff Daggs brought this action in May, 1946, against Rear Admiral Grover C. Klein as Commandant of the Mare Island Navy Yard, and James V. Forrestal as Secretary of the Navy. The relief sought is a mandatory order directed to defendants

compelling them (a) to reinstate plaintiff as a civil service employee at Mare Island in the same capacity in which he was serving when he was discharged; (b) to compensate plaintiff for the period of his removal at the same rate of pay he was receiving when he was discharged; and (c) to restore to plaintiff his right to accrued leave with pay.

Government counsel representing defendants "appeared specially" and moved to dismiss the action with prejudice, on the grounds that the Court had no jurisdiction of the subject matter or of Secretary Forrestal and that the complaint fails to state a claim upon which relief could be granted. The motion was supported by a showing [12] that Secretary Forrestal had not been served with process, that he had not waived service and that he had not appeared except to challenge jurisdiction of the court. On the remaining grounds of the motion the argument was, in substance, that it is apparent from the complaint that the alleged wrongful conduct of the Secretary of the Navy was, under the statute pleaded, discretionary and that discretionary power lawfully conferred and duly exercised is not subject to judicial interference; that the forum of plaintiff's action is the Court of Claims; and that the action is, in effect, an action against the United States. These arguments were supported by persuasive authority. Nevertheless, for reasons hereafter appearing, if no motion to dismiss had been filed, the Court, *sua sponte*, would have and does now observe that it lacks jurisdiction to entertain the cause.

Jurisdictional allegations are that the matter in controversy exceeds, "exclusive of costs or interest, the sum of (3000) and arises under the Constitution and Laws of the United States." (Jud. Code §24 (1), 28 U.S.C.A. §41(1). The complaint makes no other reference to the Constitution. The law pleaded is the Act of June 28, 1940, Public Law 671, 76th Congress, 54 Stat. 676, 50 U.S.C.A. App. §1151-1156). Plaintiff predicates his action on § 6 of that Act, which provides for reemployment of returned employees under the Civil Service Retirement Act of May 29, 1930, for suspension of retirement annuity payments during reemployment; deductions for annuity retirement, etc., all of which is preliminary to the following proviso: [13]

"That during the national emergency \* \* \* the provisions of the Act of August 24, 1912 \* \* \* shall not apply to any civil service employee of the War or Navy departments \* \* \* whose immediate removal is, in the opinion of the secretary (of the Navy) concerned, is warranted by the demands of national security \* \* \* Those persons summarily removed may, if in the opinion of the Secretary concerned and subsequent investigation so warrants, be reinstated, and if so reinstated shall be allowed compensation for the period of such removal at the rate they were receiving on the date of removal\* \* \*."

The Section further provides that within 30 days after removal a removed person may appear and be

fully informed of the reason for his discharge and thereafter, within 30 days, he may make statements or affidavits of why he should be retained and not removed.

In substance, and so far as now pertinent, the complaint alleges that from November 6, 1926, to June 30, 1941, plaintiff was a federal civil service employee at Mare Island; that on or about the last mentioned date he was discharged by Rear Admiral W. L. Friedell, then Commandant of the Navy Yard; that on July 24, 1941, plaintiff was advised in writing by Friedell that his discharge was warranted by the demands of national security because a confidential investigation had disclosed that he did not possess the requisite loyalty to the United States by reason of his active association with an organization which advocated overthrow of the constitutional form of government of the United States; that thereafter plaintiff informed Friedell in writing (of facts on which he relied for his retention together with his personal opinion) why he should not have been discharged; that repeated demands had been made on defendants and Friedell that plaintiff be fully informed of the reasons for his removal and for compensation; that defendants and Friedell had unlawfully failed and refused (to comply); and that [14] plaintiff is without a remedy unless this court orders the relief prayed.

On its face the complaint shows that this action does not arise under the Constitution or any law of the United States. In other words no federal question is presented. (See *Leather Manufacturers*



Bank v. Cooper, 120 U.S. 778; Campbell v. Chase National Bank, 2 Cir., 71 F. 2d. 669). To come within the jurisdiction of the District Court on the basis pleaded, more is required than that the right sought to be enforced originated in a federal law. (Cook County v. Cahmet Etc. Co., 138 U. S. 635). It is at least debatable whether or not plaintiff has a right of action and if so whether it originated in the law relied on. To arise under a law of the United States an action must involve a controversy respecting the validity, construction or effect of the law pleaded, upon the determination of which the result depends (Shulthis v. McDougal, 225 U. S. 561, 569; In Re Winn, 213 U. S. 458, 465; Fully v. First National Bank, 299 U. S. 109; Marshall v. Desert Properties Co., 9 Cir. 103 F. 2d 551; Chaskin v. Thompson, 9 Cir., 143 F. 2d 566; Bell v. Hood, 9 Cir., 150 F. 2d 97, 100; Barnhart v. Western Maryland Ry. Co., 2 Cir., 128 F. 2d 709; Miller v. Long, 4 Cir., 152 F. 2d 197).

The instant action has no relation to the validity, construction or effect of the law relied on. On the contrary the subject matter, if any, is the failure of Rear Admiral Friedell (who, by the way, is not a party defendant) and these defendants fully to inform plaintiff of the reason for his discharge; and this in the face of pleading the written evidence of such information. The fact, if it be a fact, that plaintiff is remediless has no place in considering the question or jurisdiction, which is statutory.

The action will be dismissed for lack of jurisdiction.

It Is So Ordered.

A. F. ST. SURE,  
United States District Judge.

Dated: November 27, 1946.

[Endorsed]: Filed Nov. 29, 1946.

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[Title of District Court and Cause.]

NOTICE OF APPEAL  
(Under Rule 73(B))

Notice Is Hereby Given that James A. Daggs, Plaintiff above named hereby appeals to the Circuit Court of Appeals for the 9th Circuit from the Order of the above entitled Court dismissing the above-entitled action entered in this action on the 29th day of November, 1946.

Dated: January 10, 1947.

GLADSTEIN, ANDERSEN,  
RESNER, & SAWYER,  
HERBERT RESNER,  
NORMAN LEONARD,

Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 21, 1947. [17]

[Title of District Court and Cause.]

DESIGNATION OF  
RECORD ON APPEAL

Comes now James A. Daggs, plaintiff and appellant herein and designates the following as the record on appeal in the above entitled matter:

1. Complaint for Reinstatement of Civil Service Employee and for Compensation, filed herein on May 6, 1946.
2. Motion to Dismiss.
3. Memorandum Opinion on Motion to Dismiss and Order Dismissing Action, filed herein on November 29, 1946.
4. Notice of Appeal, filed herein on January 21, 1947.
5. This Designation of Record on Appeal.

Dated: January 23, 1947.

GLADSTEIN, ANDERSEN,  
RESNER & SAWYER,  
HERBERT RESNER,  
NORMAN LEONARD.

Filed Jan. 30, 1947. [18]

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[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including April 11, 1947, to file the Record on

Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: February 28, 1947.

MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed Feb. 28, 1947. [19]

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District Court of the United States  
Northern District of California

CERTIFICATE OF CLERK TO  
TRANSCRIPT OF RECORD ON APPEAL

I. C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing nineteen pages, numbered from 1 to 19, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of James A. Daggs, Plaintiff, vs. Grover C. Klein, etc., et al., Defendants, No. 25927 S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$3.60 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at

San Francisco, California, this 18th day of March  
A.D. 1947.

C. W. CALBREATH,  
Clerk.

/s/ M. E. VAN BUREN,  
Deputy Clerk. [20]

[Endorsed]: Received March 26, 1947.

Filed May 7, 1947.

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[Endorsed]: No. 11581. United States Circuit Court of Appeals for the Ninth Circuit. James A. Daggs, Appellant, vs. Grover C. Klein, Rear Admiral, United States Navy, Commandant, Mare Island Navy Yard and James V. Forrestal, Secretary of the Navy, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed April 5, 1947.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11581

JAMES A. DAGGS,

Appellant,

vs.

GROVER C. KLEIN, Rear Admiral, United States  
Navy, Commandant, Mare Island Navy Yard;  
JAMES V. FORRESTAL, Secretary of the  
Navy,

Respondents.

STATEMENT OF POINTS TO BE RELIED  
UPON AND DESIGNATION OF PARTS  
OF RECORD TO BE PRINTED

Comes now James A. Daggs, the appellant in the above-entitled cause, and states that the points upon which he intends to rely in this court in this case are as follows:

I.

That the Court below erred in granting respondents' motion to dismiss for lack of jurisdiction in that the Court below did have jurisdiction since it appears on the face of the complaint that the construction and application of a Federal statute is involved in this proceeding.

II.

Appellant further states that the whole of the

record as filed is necessary for the consideration of the case.

Dated: May 6, 1947.

GLADSTEIN, ANDERSEN,  
RESNER & SAWYER,

/s/ HERBERT RESNER,

/s/ NORMAN LEONARD,

Counsel for Appellant.

Receipt of foregoing Statement of Points hereby acknowledged this 7th day of May, 1947.

FRANK J. HENNESSY,  
U. S. Attorney.

[Endorsed] Filed May 7, 1947.





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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JOHN BRAITO,

Appellant,

vs.

GROVER C. KLEIN, Rear Admiral, United States  
Navy, Commandant Mare Island Navy Yard,  
JAMES V. FORRESTAL, Secretary of the  
Navy,

Appellees.

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**Transcript of Record**

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**Upon Appeal from the District Court of the United States**  
**for the Northern District of California,**  
**Southern Division**

FILED

NOV 28 1947

PAUL P. O'BRIEN,

CLERK



No. 11772

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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JOHN BRAITO,

Appellant,

vs.

GROVER C. KLEIN, Rear Admiral, United States  
Navy, Commandant Mare Island Navy Yard,  
JAMES V. FORRESTAL, Secretary of the  
Navy,

Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
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## NAMES AND ADDRESSES OF ATTORNEYS

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FRANK J. HENNESSY,  
United States Attorney,  
Northern District of California,  
San Francisco, California.

Post Office Building,  
San Francisco, California.

Attorney for Defendants and  
Appellees.

In the United States District Court, for the  
Northern District of California, Southern Division

No. 25928-G

JOHN BRAITO,

Plaintiff,

vs.

GROVER C. KLEIN, Rear Admiral, United States  
Navy, Commandant Mare Island Navy Yard;  
JAMES V. FORRESTAL, Secretary of the  
Navy,

Defendants.

COMPLAINT FOR REINSTATEMENT OF  
CIVIL SERVICE EMPLOYEE AND FOR  
COMPENSATION

Plaintiff complains of the defendants above  
named and for cause of action against said defendants alleges:

I.

The matter in controversy exceeds, exclusive of costs or interest, the sum of three thousand dollars (\$3,000) and arises under the Constitution and Laws of the United States.

II.

That during all of the times herein mentioned plaintiff was and now is a citizen of the United States, now residing in the City of Benicia, State of California. [1\*]

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\* Page numbering appearing at foot of page of original certified Transcript of Record.



## III.

That during all times herein mentioned plaintiff was and now is a member of the Order of Sons of Italy in America, a fraternal organization, the Hermann Sons, a fraternal organization, the International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, and the United Federal Workers of America.

## IV.

That during the period 1919 to 1922 plaintiff was a shipfitter at the Mare Island Navy Yard, located at Mare Island, California, and from 1925, until the time of his discharge as hereinafter set forth plaintiff was a Federal civil-service employee at said Mare Island Navy Yard, commencing as a shipfitter's helper, then becoming a shipfitter, and at the time of his discharge serving as a flange turner receiving \$8.64 per day.

## V.

The defendant Grover C. Klein, Rear Admiral, United States Navy, now is the duly appointed and acting Commandant of the Mare Island Navy Yard, succeeding W. L. Friedell, Rear Admiral, United States Navy, as said Commandant; that during all times herein mentioned said defendant Klein and said Friedell were acting with the knowledge and approval of the Secretary of the Navy.

## VI.

That defendant James V. Forrestal is the duly appointed and acting Secretary of the Navy of the United States.

## VII.

That on the 28th day of June, 1940, the Congress of the United States passed the Act of June 28, 1940, Public Law Number 671, 76th Congress, 54 Stat. 676, Tit. 50 U. S. C. A. App. Sec. 1156, providing in part as follows:

Provided further, That during the national emergency declared by the President on Sept. 8, 1939, to exist, the provisions of section 6 of the [2] Act of August 24, 1912 (37 Stat. 555; 5 U. S. C. Sec. 652), shall not apply to any civil-service employee of the War or Navy Departments or of the Coast Guard, or their field services, whose immediate removal is, in the opinion of the Secretary concerned warranted by the demands of national security, but nothing herein shall be construed to repeal, modify, or suspend the proviso in that section. Those persons summarily removed under the authority of this section may, if in the opinion of the Secretary concerned, subsequent investigation so warrants, be reinstated, and if so reinstated shall be allowed compensation for the period of such removal at the rate they were receiving on the date of removal. And provided, further, That within thirty days after such removal any such person shall have an

opportunity personally to appear before the official designated by the Secretary concerned and be fully informed of the reasons for such removal, and to submit, within thirty days thereafter, such statement or affidavits, or both, as he may desire to show why he should be retained and not removed.

### VIII.

That on or about the 24th day of July, 1941, plaintiff was discharged from his employment at the Mare Island Navy Yard and was thereafter, on the 26th day of July, 1941, personally informed by said Friedell, then Commandant of said Navy Yard, that the reason for the discharge was as follows:

Since September, 1939, the United States of America has been under a condition of emergency which has now been declared by the President to be unlimited. Under this condition, in spite of the very liberal governmental labor policy in the employment of its citizens, it has been incumbent upon all of its employees so to conduct themselves that there should be not the least concern on the part of their associates or their administrative officials as to their unquestioned adherence to the principles of the government and their loyalty in furthering its defense against enemies within or without.

Despite the constitutional rights of individuals as to freedom of speech and political

opinion, these rights are not directly concerned in the right to actual employment in a governmental activity. This, each individual must maintain for himself by the correctness of his attitude and his behaviour.

Mr. Braitto, your discharge was warranted by the demands of national security and was made from this Navy Yard because a confidential investigation disclosed that you do not possess the requisite degree of loyalty to the United States to remain an employee at this Navy Yard since you have been actively associated with members of and attending meetings of an organization which advocates the overthrow of the constitutional form of government of the United States. [3] You are advised that within thirty days from the date of this interview, Thursday, July 24, 1941, you have the privilege of submitting any statement or affidavit, or both, which you may desire to show why you should be retained and not discharged. These must be submitted in writing.

## IX.

That on or about the 4th day of August, 1941, plaintiff, informed said Friedell in writing as follows:

In conformity with the proceedings of July 26, 1941, in your office at Mare Island, California, on which date, I appeared before you, to be informed of the reason for having been discharged, from employment at the Navy Yard

(Mare Island), herewith I, John Braitto, respectfully and truthfully, wish to submit to you Sir, this statement:

In sincerity to myself, and to anybody that may be involved in accusing me of disloyalty to the United States of America, I must, emphatically deny such accusation, and here I wish to challenge anybody that wants to question my loyalty to the United States of America, to the Constitution and Laws of this country of which I became a citizen in the year of 1915, A. D.

The solemn oath I took on the 26th day of August 1915, in the Superior Court of San Francisco, on which day I became a citizen of the United States of America, is still fresh and in the fore of my mind, and God help me to maintain that oath inviolable.

I am ready today, as I ever was before, to defend the United States of America, its independence, the Constitution, and to obey its laws.

I have five sons, all born in the State of California, and educated in the public school of Vallejo, all graduated from the Vallejo High school, of the ages of 21 to 29, and all registered to be inducted into the armed forces of and to defend the United States of America. They are all willing, and most earnestly prepared to do it. Their reputation in the community is of the highest and best standing, and so is that of the Braitto family.

The accusation that I have been actively associated with members of and attending meetings of an organization which advocates the overthrow of the Constitutional form of government of the United States of America is to me most strange, for in the many years since I have been living with my family in this community and city of Vallejo (since 1920) I have never yet met a single person, less an organization, of which I heard that their object is, or was, to overthrow the constitutional form of government of the United States of America. This accusation sounds to me vague and almost ridiculous, and most surely I must deny it.

True it is that I am a member of two bona fide and long-established fraternal organizations in this community, also of a labor organization (United Federal Workers of America) which activity and patriotism is to my estimation unquestionable. [4]

In concluding this statement I respectfully ask you Sir, W. L. Friedell, Rear Admiral and Commandant of the Mare Island Navy Yard, in fair play and justice, and in the name of democracy and spirit of Americanism, and in consideration of my right as a conscientious American citizen to take the proper action and provide for an early reinstatement to my job and rights on the Navy Yard.

As I have been employed in Mare Island Navy Yard for about 19 years, I consider this statement sufficient without including affidavits or anything else in presenting this case to you.

If this statement, however, shall be considered insufficient or incomplete, I am ready at your request, to supplement this with other statements or affidavits, or to appear in person, and verbally answer any question that may be necessary for the clarification of this matter.

### X.

That since the 4th day of August, 1941, plaintiff has made repeated demands upon defendants and the said Friedell that he be fully informed of the reason for his removal as provided for in said Public Law No. 671 hereinabove set forth and for reinstatement as a civil-service employee at the Mare Island Navy Yard together with compensation for the period of removal as provided for in said Public Law No. 671; that defendants and said Friedell have unlawfully failed and refused to fully inform plaintiff of the reasons for the removal of plaintiff from said employment or to reinstate or compensate plaintiff; that plaintiff has at no time been fully informed of the reasons for his discharge and the only reasons given to plaintiff are those hereinabove specified in the statement made by Friedell; that said statements were and are too vague and indefinite to enable plaintiff to prepare and submit the statements or affidavits referred to in Public Law 671 to show why plaintiff should be retained and not removed; that plaintiff believes that any further efforts to procure voluntary action on the part of defendants would be useless.

## XI.

That plaintiff was and is entitled to the notice and [5] hearing provided for by Congress in said Public Law No. 671 as a condition precedent to the removal of civil-service employees; that the arbitrary and capricious failure and refusal of defendants and Friedell to afford plaintiff the right to the said notice and hearing was and is in excess of the authority vested in defendants and Friedell by Congress and constitutes a violation of said Public Law No. 671 and a violation of the right of plaintiff to due process of law as provided for in the 5th Amendment to the Constitution of the United States.

## XII.

That the only stated ground upon which plaintiff was discharged was that he had been actively associated with members of and attending meetings of an organization which advocates the overthrow of the constitutional form of government of the United States; there was not and is not any charge that the alleged activities of plaintiff evidenced a working alliance with said unnamed organization to bring the said purpose to fruition. In that connection plaintiff alleges that during all times herein mentioned his entire course of conduct prior to his dismissal was and now is for the attainment of wholly lawful objectives. Plaintiff further alleges that without being informed of the name or identity of the said organization, the ground for the discharge of plaintiff as specified made mean-



ingless and abortive the provision in Public Law No. 671 giving to a discharged person, after being fully informed of the reasons for the removal, the right to file such statements or affidavits, or both, as he may desire to show why he should be retained and not removed, in that without being informed of the name or identity of said organization plaintiff was denied the right to set forth in any statement or affidavit whether he was actively associated with said organization and, if so, whether the organization did advocate the overthrow of the constitutional form of government of the United States and if the organization did espouse such an objective whether the acts of plaintiff evidenced a working alliance [6] with said organization to bring its program to fruition.

### XIII.

That plaintiff is wholly without remedy in the premises and unless this court directs the defendants to reinstate plaintiff with compensation for the period of removal as provided for in Public Law No. 671 that plaintiff will suffer irreparable injury.

### XIV.

That at the time of the removal of plaintiff as aforesaid there was due plaintiff certain accrued leave with pay amounting to approximately four hundred dollars (\$400.00); that defendants have failed and refused to pay said amount or any part thereof to plaintiff.

Wherefore, plaintiff prays judgment:

1. That defendants be ordered forthwith to reinstate plaintiff as a civil-service employee at the Mare Island Navy Yard in the same capacity in which plaintiff was working at the time of his discharge.
2. That defendants be ordered to compensate plaintiff for the period of his removal at the rate of pay plaintiff was receiving on the date of his discharge.
3. That defendants be ordered to reinstate the right of plaintiff to accrued leave with pay as the same existed on the date of discharge.
4. For such other and further relief as the court may deem proper in the premises.

GLADSTEIN, ANDERSEN, RESNER,  
SAWYER & EDISES,

By /s/ HERBERT RESNER,  
/s/ MYER C. SYMONDS,

Attorneys for Plaintiff. [7]

State of California,  
City and County of San Francisco—ss.

John Braitto, being first duly sworn, deposes and says:

That he is the plaintiff named in the within action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters

therein stated on information and belief, and as to those matters that he believes it to be true.

/s/ JOHN BRAITO.

Subscribed and sworn to before me this 29th day of April, 1946.

[Seal] ALICE C. MORSE,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed May 6, 1946. [8]

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[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT FOR REIN-  
STATEMENT OF CIVIL SERVICE EM-  
PLOYEE AND FOR COMPENSATION

Comes now plaintiff and, as of right, files this; his first amended complaint herein, and complains of the defendants above named and for cause of action against said defendants alleges:

I.

The matter in controversy exceeds, exclusive of costs or interest, the sum of three thousand dollars (\$3,000) and arises under the Constitution and Laws of the United States.

II.

That during all of the times herein mentioned plaintiff was and now is a citizen of the United States, now residing in the City of Benicia, State of California.

## III.

That during all times herein mentioned plaintiff was and now is a member of the Order of Sons of Italy in America, a fraternal organization, the Hermann Sons, a fraternal organization, the International [9] Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, and the United Federal Workers of America.

## IV.

That during the period 1919 to 1922 plaintiff was a shipfitter at the Mare Island Navy Yard, located at Mare Island, California, and from 1925, until the time of his discharge as hereinafter set forth plaintiff was a Federal Civil-service employee at said Mare Island Navy Yard, commencing as a shipfitter's helper, then becoming a shipfitter, and at the time of his discharge serving as a flange turner receiving \$8.64 per day.

## V.

The defendant Grover C. Klien, Rear Admiral, United States Navy, now is the duly appointed and acting Commandant of the Mare Island Navy Yard, succeeding W. L. Friedell, Rear Admiral, United States Navy, as said Commandant; that during all times herein mentioned said defendant Klien and said Friedell were acting with the knowledge and approval of the Secretary of the Navy.

## VI.

That defendant James V. Forrestal is the duly appointed and acting Secretary of the Navy of the United States.

## VII.

That on the 28th day of June, 1940, the Congress of the United States passed the Act of June 28, 1940, Public Law Number 671, 76th Congress, 54 Stat. 676, Tit. 50 U. S. C. A. App. Sec. 1156, providing in part as follows:

Provided further, That during the national emergency declared by the President on September 8, 1939, to exist, the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555; 5 U. S. C. Sec. 652), shall not apply to any civil-service employee of the War or Navy Departments or of the Coast Guard, or their field services, whose immediate removal is, in the opinion of the Secretary concerned warranted by the demands of national security, but nothing herein shall be construed to repeal, modify, or suspend the proviso in that section. Those persons summarily removed under the authority of this section may, if in the opinion of the Secretary concerned, subsequent investigation so warrants, be reinstated, and if so reinstated shall be allowed compensation for the [10] period of removal at the rate they were receiving on the date of removal. And provided, further, That within thirty days after

such removal any such person shall have an opportunity personally to appear before the official designated by the Secretary concerned and be fully informed of the reasons for such removal, and to submit, within thirty days thereafter, such statement or affidavits or both, as he may desire to show why he should be retained and not removed.

### VIII.

That on or about the 24th day of July, 1941, plaintiff was discharged from his employment at the Mare Island Navy Yard and was thereafter, on the 26th day of July, 1941, personally informed by said Friedell, then Commandant of said Navy Yard, that the reason for the discharge was as follows:

Since September, 1939, the United States of America has been under a condition of emergency which has now been declared by the President to be unlimited. Under this condition, in spite of the very liberal governmental labor policy in the employment of its citizens, it has been incumbent upon all of its employees so to conduct themselves that there would not be the least concern on the part of their associations or their administrative officials as to their unquestioned adherence to the principles of the government and their loyalty in furthering its defense against enemies within or without.

Despite the constitutional rights of individuals as to freedom of speech and political opinion, these rights are not directly concerned in the right to actual employment in a governmental activity. This, each individual must maintain for himself by the correctness of his attitude and his behaviour.

Mr. Braitto, your discharge was warranted by the demands of national security and was made from this Navy Yard because a confidential investigation disclosed that you do not possess the requisite degree of loyalty to the United States to remain an employee at this Navy Yard since you have been actively associated with members of and attending meetings of an organization which advocates the overthrow of the constitutional form of government of the United States. You are advised that within thirty days from the date of this interview, Thursday, July 24, 1941, you have the privilege of submitting any statement or affidavit, or both, which you may desire to show why you should be retained and not discharged. These must be submitted in writing.

## IX.

That on or about the 4th day of August, 1941, plaintiff informed said Friedell in writing as follows:

In conformity with the proceeding of July 26, 1941, in your office at Mare Island, California, on which date, I appeared before you,

to be informed of the reason for having been discharged from employment at the Navy Yard (Mare Island), herewith I, John Braitto, respectfully and truthfully, wish to submit to you [11] Sir, this statement:

In sincerity to myself, and to anybody that may be involved in accusing me of disloyalty to the United States of America, I must, emphatically deny such accusation, and here I wish to challenge anybody that wants to question my loyalty to the United States of America, to the Constitution and Laws of this country of which I became a citizen in the year of 1915 A. D.

The solemn oath I took on the 26th day of August, 1915, in the Superior Court of San Francisco on which day I became a citizen of the United States of America is still fresh and in the fore of my mind, and God help me to maintain that oath inviolable.

I am ready today, as I ever was before, to defend the United States of America, its independence, the Constitution, and to obey its laws.

I have five sons, all born in the State of California, and educated in the public school of Vallejo, all graduated from the Vallejo High School, of the ages of 21 to 29, and all registered to be inducted into the armed forces of and to defend the United States of America. They are all willing, and most earnestly pre-



pared to do it. Their reputation in the community is of the highest and best standing, and so is that of the Braitto family.

The accusation that I have been actively associated with members of and attending meetings of an organization which advocates the overthrow of the Constitutional form of government of the United States of America is to me most strange, for in the many years since I have been living with my family in this community and city of Vallejo (since 1920) I have never yet met a single person, less an organization, of which I heard that their object is, or was, to overthrow the constitutional form of government of the United States of America. This accusation sounds to me vague and almost ridiculous, and most surely I must deny it.

True it is that I am a member of two bona fide and long-established fraternal organizations in this community, also of a labor organization (United Federal Workers of America) which activity and patriotism is to my estimation unquestionable.

In concluding this statement I respectfully ask you Sir, W. L. Friedell, Rear Admiral and Commandant of the Mare Island Navy Yard, in fair play and justice, and in the name of democracy and spirit of Americanism, and in consideration of my right as a conscientious American citizen to take the proper action and provide for an early reinstatement to my job and rights on the Navy Yard.

As I have been employed in Mare Island Navy Yard for about 19 years. I consider this statement sufficient without including affidavits or anything else in presenting this case to you.

If this statement, however, shall be considered insufficient or incomplete, I am ready at your request, to supplement this with other statements or affidavits, or to appear in person, and verbally answer any question that may be necessary for the clarification of this matter.

### X.

That since the 4th day of August, 1941, plaintiff has made repeated demands upon defendants and the said Friedell that he be fully informed of the reason for his removal as provided for in said Public Law No. 671 hereinabove set forth and for reinstatement as civil-service employee at the Mare Island Navy Yard together with compensation for the period of removal as provided for in said Public Law No. 671; that defendants and said Friedell have unlawfully failed and refused to fully inform plaintiff of the reasons for the removal of plaintiff from said employment or to reinstate or compensate plaintiff; that plaintiff has at no time been fully informed of the reasons for his discharge and the only reasons given to plaintiff are those hereinabove specified in the statement made by Friedell; that said statements were and are too vague and indefinite to enable plaintiff to prepare and submit

the statements or affidavits referred to in Public Law 671 to show why plaintiff should be retained and not removed; that plaintiff believes that any further efforts to procure voluntary action on the part of defendants would be useless.

## XI.

That plaintiff was and is entitled to the notice and hearing provided for by Congress in said Public Law No. 671, as a condition precedent to the removal of civil-service employees; that the arbitrary and capricious failure and refusal of defendants and Friedell to afford plaintiff the right to the said notice and hearing was and is in excess of the authority vested in defendants and Friedell by Congress and constitutes a violation of said Public Law No. 671, and a violation of the right of plaintiff to due process of law as provided for in the 5th amendment to the Constitution of the United States.

## XII.

That the only stated ground upon which plaintiff was discharged was that he had been actively associated with members of and attending meetings of an organization which advocates the overthrow of the constitutional form of government of the United States; there was not and is not any [13] charge that the alleged activities of plaintiff evidenced a working alliance with said unnamed organizations to bring the said purpose to fruition.

In that connection plaintiff alleges that during all times herein mentioned his entire course of conduct prior to his dismissal was and now is for the attainment of wholly lawful objectives. Plaintiff further alleges that without being informed of the name or identity of the said organization, the ground for the discharge of plaintiff as specified made meaningless and abortive the provision in Public Law No. 671 giving to a discharged person, after being fully informed of the reasons for the removal, the right to file such statements or affidavits, or both as he may desire to show why he should be retained and not removed, in that without being informed of the name or identity of said organization plaintiff was denied the right to set forth in any statement or affidavit whether he was actively associated with said organization and, if so, whether the organization did advocate the overthrow of the constitutional form of government of the United States and if the organization did espouse such an objective whether the acts of plaintiff evidenced a working alliance with said organization to bring its program to fruition.

### XIII.

That the action of the defendants in removing the plaintiff from his employment, as aforesaid, was, and is, a violation of the rights guaranteed to the plaintiff by the first and fifth amendments to the Constitution of the United States, in that said action abridged plaintiff's freedom of speech, of the

press, and his right, peaceably, to assemble, and in that said action deprived plaintiff of his property without due process of law.

#### XIV.

That plaintiff is wholly without remedy in the premises, and unless this court directs the defendants to reinstate plaintiff with compensation for the period of removal as provided for in Public Law No. 671, that plaintiff will suffer irreparable injury.

#### XV.

That at the time of the removal of plaintiff, as aforesaid, there was due plaintiff certain leave with pay amounting [14] to approximately four hundred dollars (\$400.00) that defendants have failed and refused to pay said amount or any part thereof to plaintiff.

Wherefore, plaintiff prays judgment:

1. That defendants be ordered forthwith to reinstate plaintiff as a civil-service employee at the Mare Island Navy Yard in the same capacity in which plaintiff was working at the time of his discharge.

2. That defendants be ordered to compensate plaintiff for the period of his removal at the rate of pay plaintiff was receiving on the date of his discharge.

3. That defendants be ordered to reinstate the right of plaintiff to accrued leave with pay as the same existed on the date of discharge.

4. For such and other further relief as the court may deem proper in the premises.

GLADSTEIN, ANDERSON, RESNER  
& SAWYER

By /s/ HERBERT RESNER

By /s/ NORMAN LEONARD

Attorneys for Plaintiff.

State of California,  
City and County of San Francisco—ss:

Norman Leonard, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in the within and foregoing action and makes this verification for and on behalf of said plaintiff for the reason that said plaintiff is at present out of the county in which affiant has his office; that he has read the within and foregoing first amended complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

NORMAN LEONARD. [15]

Subscribed and sworn to before me this 30th day of January, 1947.

ALICE C. MORSE,  
Notary Public for the City and County of San  
Francisco, State of California.

Acknowledgment of receipt of copy.

[Endorsed]: Filed Jan. 31, 1947. [16]

[Title of District Court and Cause.]

### MOTION TO DISMISS

Now comes the defendants James V. Forrestal, Secretary of the Navy, appearing herein specially, and for no other purpose and objecting to the jurisdiction of the Court over him, and Grover C. Klein, Rear Admiral United States Navy, Commander, Mare Island Navy Shipyard, by Frank J. Hennessy, United States Attorney, and William E. Licking, Assistant United States Attorney, and move the Court to dismiss this suit on the following grounds;

#### I.

As to the defendant James V. Forrestal, appearing specially, the Court lacks jurisdiction over his person since said defendant had his official residence in the District of Columbia and is not an inhabitant, resident or citizen of California (28 U.S.C. 112) and has not consented to be sued in this Court and does except to the jurisdiction of this Court and to the venue of these proceedings.

#### II.

That the Court lacks jurisdiction over the subject matter of the Complaint;

#### III.

That the suit is in effect against the United States which has not consented to be sued in such a case;

## IV.

That the complaint fails to state a cause of action against defendants or any of them on which relief can be granted;

## V.

That the suit may not be maintained in the absence of the principal defendant, James V. Forrestal, Secretary of the Navy, who, because any determination herein will affect his rights, orders and statutory responsibilities and duties is an indispensable party, who has not been and cannot without his consent be subjected to the jurisdiction of this Court. [17]

Wherefore defendants pray that said complaint be dismissed with prejudice.

/s/ FRANK J. HENNESSY,  
United States Attorney.

/s/ WILLIAM E. LICKING,  
Assistant United States  
Attorney.  
Attorneys for Defendants.

[Endorsed]: Filed Jun. 23, 1947. [18]



NOTICE OF MOTION

To Plaintiff above named, and to Messrs. Gladstein, Andersen, Resner, Sawyer & Edises, 240 Montgomery Street, San Francisco, 4, California, his attorney:

Please Take Notice that the undersigned will bring the attached Motion to Dismiss on for hearing before this Court at Room 258, Post Office and Court House Building, City and County of San Francisco, California, on the 30th day of June, 1947, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

FRANK J. HENNESSY

United States Attorney.

WILLIAM E. LICKING,

Assistant United States  
Attorney.

Attorneys for Defendants.

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[Title of District Court and Cause.]

ORDER GRANTING MOTION TO DISMISS

The action of the Secretary of the Navy, through the Commandant of the Mare Island Navy Yard, in discharging plaintiff from his civil-service position was taken pursuant to statutory authority (50 USCA App. Sec. 1156.). Plaintiff's complaint states, at most, an alleged improper exercise of that authority in failing, after dismissal, to fully inform plaintiff of the reasons for his removal. It does not state a case of extra-official action without legislative sanction. Whether plaintiff alleges facts entitling him to reinstatement or to an opportunity to

be more fully informed of the reasons for his dismissal, the [20] Secretary of the Navy in whom is vested the statutory power of dismissal and of reinstatement under 50 USCA App. Sec. 1156, is an indispensable party to the action. (*Neher v. Harwood*, 128 F. 2d 846, [9th Cir.] Cert. Denied Oct. 12, 1942.)

Ordered:

Defendants' motion to dismiss is granted for lack of jurisdiction over the defendant, James V. Forrestal, Secretary of the Navy, an indispensable party to the action.

Dated: August 5, 1947.

LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed Aug. 5, 1947. [21]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL UNDER RULE 73 (B)

Notice Is Hereby Given that James Briato, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the 9th Circuit from the Order of the above entitled Court dismissing the above entitled action entered in this action on the 5th day of August 1947.

Dated: August 11, 1947.

GLADSTEIN, ANDERSON, RESNER  
& SAWYER,

NORMAN LEONARD,

Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 14, 1947. [22]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes now John Braitto, plaintiff and appellant herein, and designates the following as the record on appeal in the above entitled matter:

1. Complaint for Reinstatement of Civil Service Employee and for Compensation, filed herein on May 6, 1946.

2. First Amended Complaint for Reinstatement of Civil Service Employee and for Compensation filed herein on January 31, 1947.

3. Motion to Dismiss.

4. Order Granting Motion to Dismiss, filed herein on August 5, 1947.

5. Notice of Appeal, filed herein on August 12, 1947.

6. This Designation of Record on Appeal.

Dated: August 12, 1947.

GLADSTEIN, ANDERSEN, RESNER  
& SAWYER,  
NORMAN LEONARD,  
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 14, 1947. [23]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good Cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including November 1, 1947, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: September 23, 1947.

LOUIS E. GOODMAN,  
United States District Judge.

[Endorsed]: Filed Sep. 23, 1947. [24]

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District Court of the United States  
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 24 pages, numbered from 1 to 24, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of John Braitto, Plaintiff, vs. Grover C. Klein, etc., and James V. Forrestal, etc., Defendants, No. 25928 G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on ap-

peal is the sum of \$9.30 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 23rd day of October, A.D. 1947.

[Seal]

C. W. CALBREATH,

Clerk.

/s/ M. E. VAN BUREN,

Deputy Clerk. [25]

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No. 11772. United States Circuit Court of Appeals for the Ninth Circuit. John Braito, Appellant, vs. Grover C. Klein, Rear Admiral, United States Navy, Commandant Mare Island Navy Yard, James V. Forrestal, Secretary of the Navy, Appelles. Transcript of Record Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed October 28, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

United States Circuit Court of Appeals  
For the Ninth Circuit

No. 11772

JOHN BRAITTO,

Appellant,

vs.

GROVER C. KLEIN, Rear Admiral, United States  
Navy, Commandant Mare Island Navy Yard,  
et al,

Respondents.

STATEMENT OF POINTS TO BE RELIED  
UPON AND DESIGNATION OF PARTS OF  
RECORD TO BE PRINTED.

Comes now John Braitto, the appellant in the above entitled cause, and states that the points upon which he intends to rely in this court in this case are as follows:

I.

That the Court below erred in granting respondents' motion to dismiss.

II.

That the Court below erred in entering its order dismissing the said action.

III.

That the Court below erred in determining that the Secretary of the Navy is an indispensable party to the action.

IV.

That the Court below erred in determining that the complaint does not state a case of extra-official action without legislative sanction.

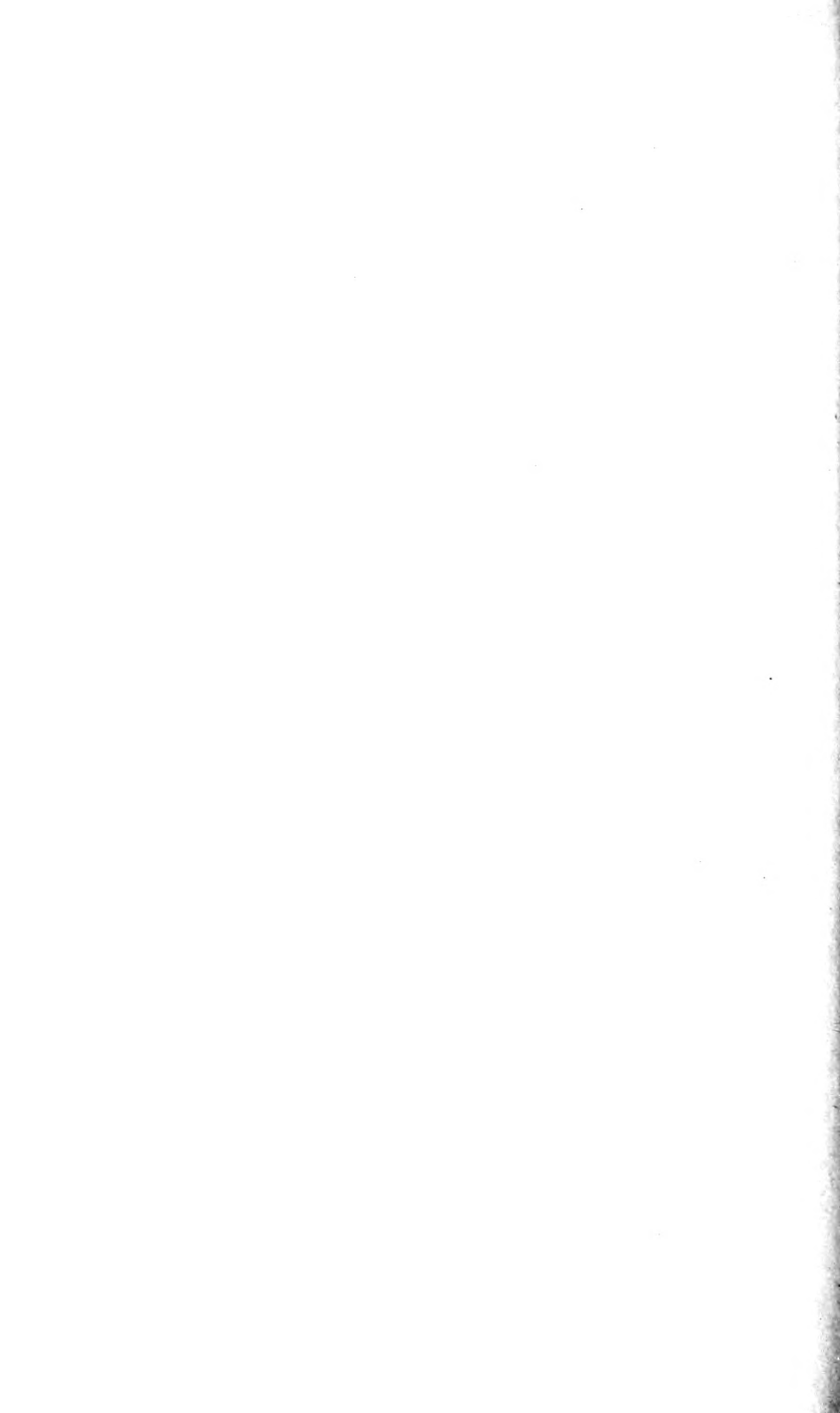
V.

Appellant further states that the whole of the record as filed is necessary for the consideration of the case.

Dated: This 12th day of August, 1947.

GLADSTEIN, ANDERSEN, RESNER  
& SAWYER,

/s/ NORMAN LEONARD,  
Attorneys for Appellant.





No. 11,581

IN THE  
United States Circuit Court of Appeals  
For the Ninth Circuit

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JAMES A. DAGGS,

*Appellant,*

vs.

GROVER C. KLEIN, Rear Admiral, United  
States Navy, Commandant, Mare Island  
Navy Yard and JAMES V. FORRESTAL,  
Secretary of the Navy,

*Appellees.*

APPELLANT'S OPENING BRIEF.

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GLADSTEIN, ANDERSEN, RESNER & SAWYER,  
HERBERT RESNER,  
NORMAN LEONARD,

240 Montgomery Street, San Francisco,

*Counsel for Appellant.*

FILED

JUL 26 1947



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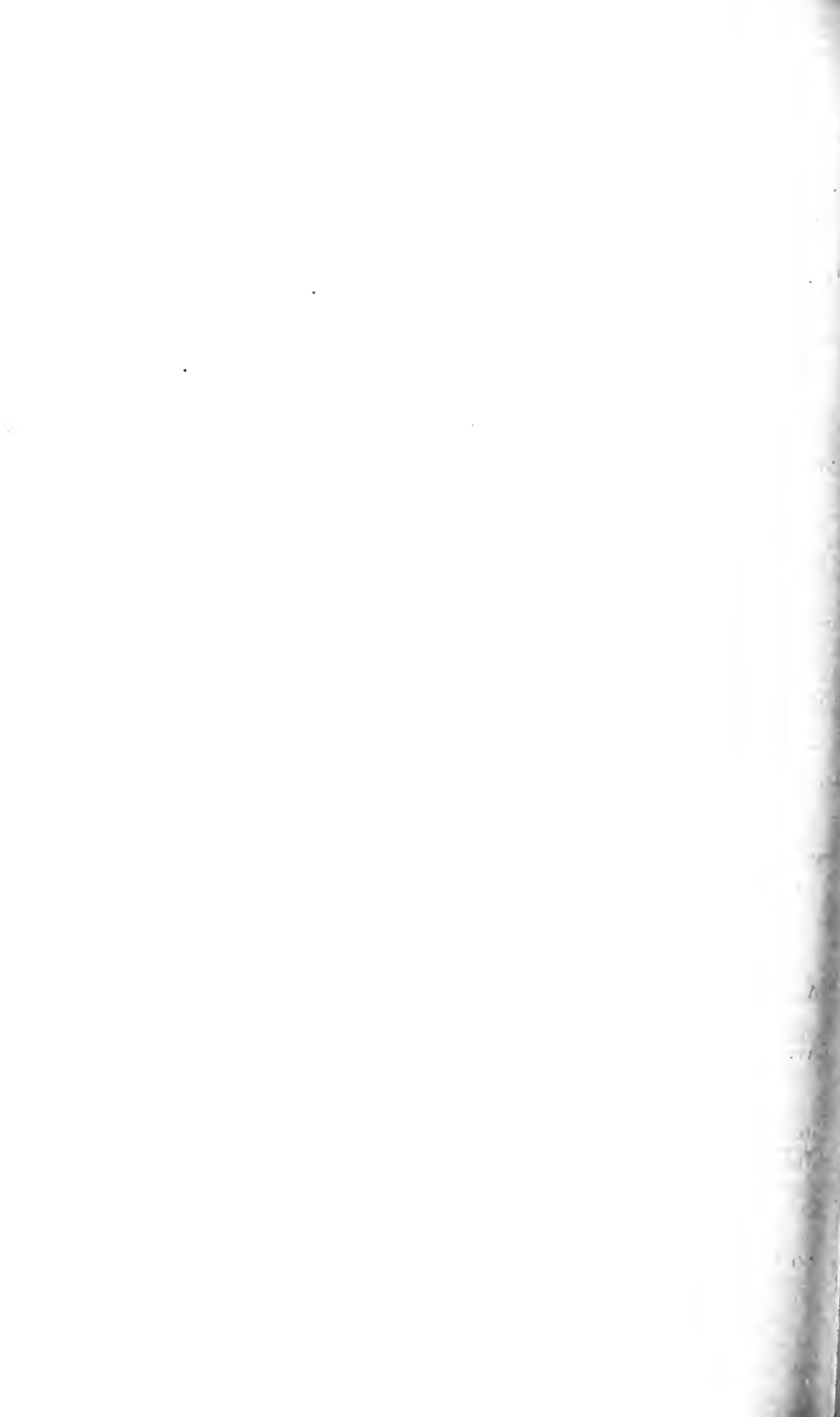
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No. 11,581

IN THE

**United States Circuit Court of Appeals  
For the Ninth Circuit**

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JAMES A. DAGGS,

*Appellant,*

vs.

GROVER C. KLEIN, Rear Admiral, United  
States Navy, Commandant, Mare Island  
Navy Yard and JAMES V. FORRESTAL,  
Secretary of the Navy,

*Appellees.*

**APPELLANT'S OPENING BRIEF.**

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**JURISDICTION.**

The jurisdiction of the District Court to entertain this action is conferred by Section 24, amended, of the Judicial Code (28 U.S.C. 41). The jurisdiction of the Circuit Court of Appeals to review the District Court's final order dismissing the action for lack of jurisdiction is conferred by Section 128, amended, of the Judicial Code (28 U.S.C. 225).

**STATUTES INVOLVED.**

Section 6 of Title 1 of Chapter 440 of the Act of June 28, 1940 (54 Stat. 679) as amended on August 21, 1941, by Chapter 385 (55 Stat. 654), so far as is relevant to this proceeding, provides:

“That during the national emergency declared by the President on September 8, 1939, to exist, the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555; 5 U.S.C. § 652), shall not apply to any civil-service employee of the War or Navy Departments or of the Coast Guard, or their field services, whose immediate removal is, in the opinion of the Secretary concerned warranted by the demands of national security, but nothing herein shall be construed to repeal, modify, or suspend the proviso in that section. Those persons summarily removed under the authority of this section may, if in the opinion of the Secretary concerned, subsequent investigation so warrants, be reinstated, and if so reinstated, shall be allowed compensation for the period of such removal at the rate they were receiving on the date of removal: *And provided further*, That within thirty days after such removal any such person shall have an opportunity personally to appear before the official designated by the Secretary concerned and be fully informed of the reasons for such removal, and to submit, within thirty days thereafter, such statement or affidavits, or both, as he may desire to show why he should be retained and not removed.” (50 U.S.C. App. 1156.)

Section 6 of the Act referred to in the foregoing excerpt reads in part as follows:



**"No person** in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof; and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; \* \* \*" (5 U.S.C. 652).

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### **QUESTIONS PRESENTED.**

1. Whether there is involved in this proceeding a question arising under the Constitution and laws of the United States.
  2. Whether the Court below erred in dismissing the action for lack of jurisdiction.
  3. Whether the Court below had jurisdiction to proceed with the action.
- 

### **THE PLEADINGS.**

The action was instituted by the filing of a complaint on May 6, 1946. (T.R., 2-11.)\* The gravamen of the complaint is that appellant, a Federal Civil Service employee at the Mare Island Navy Yard, was discharged from his employment there by the appellees and their predecessors in office, officers of the

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\*References to the Transcript of Record will be cited herein as T.R.

United States government, in violation of his rights under the Constitution of the United States and of his rights under the provisions of the above-quoted Act of Congress of June 28, 1940; the violation is alleged to have occurred in that within thirty days after his removal, appellant was not "fully informed of the reasons for such removal,"\* and consequently

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\*The complaint set forth the *verbal* statement given to appellant in connection with his discharge:

"Since September, 1939, the United States of America has been under a condition of emergency which has now been declared by the President to be unlimited. Under this condition, in spite of the very liberal governmental labor policy in the employment of its citizens, it has been incumbent upon all of its employees so to conduct themselves that there should be not the least concern on the part of their associates or their administrative officials as to their unquestioned adherence to the principles of the government and their loyalty in furthering its defense against enemies within or without.

"Despite the constitutional rights of individuals as to freedom of speech and political opinion, these rights are not directly concerned in the right to actual employment in a governmental activity. This, each individual must maintain for himself by the correctness of his attitude and his behaviour.

"Mr. Daggs, your discharge was warranted by the demands of national security and was made from this Navy Yard because a *confidential investigation disclosed that you do not possess the requisite degree of loyalty to the United States to remain an employee at this Navy Yard since you have been actively associated with members of and attending meetings of an organization which advocates the overthrow of the constitutional form of government of the United States*. You are advised that within thirty days from the date of this interview, Thursday, July 24, 1941, you have the privilege of submitting any statement or affidavit, or both, which you may desire to show why you should be retained and not discharged. These must be submitted in writing."

Appellant contends that this vague and indefinite statement does not meet the requirement of the statute.

The information to appellant was given *orally* (paragraph VIII of the Complaint [T.R., 5] alleges that appellant was "personally informed"); the District Court was obviously in error when it said that there was a "pleading [of] the *written* evidence of such information" (T.R., 17).

not given an opportunity to submit "such statement or affidavits, or both, as he (might) desire to show why he should be retained and not removed."

On September 3, 1946, the appellees filed their motion to dismiss the action upon the grounds that the court lacked jurisdiction over the person of the appellee Forrestal, that the court lacked jurisdiction over the subject matter of the complaint, that the suit was in effect one against the United States which had not consented to be sued, that the complaint failed to state a cause of action against the defendants on which relief could be granted, and that the suit might not be maintained in the absence of the appellee Forrestal who was asserted in the motion to be an indispensable party. (T.R., 11-12.)

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#### **THE OPINION OF THE DISTRICT COURT.**

On November 27, 1946, the District Court issued its Memorandum Opinion on Motion to Dismiss and Order Dismissing Action (T.R., 13-18), in which the court, after reviewing the contentions advanced by government counsel, recited: "Nevertheless, for reasons hereafter appearing, if no motion to dismiss had been filed, the Court, sua sponte, would have and does now observe that it lacks jurisdiction to entertain the cause." (T.R., 14.)

The Court thereupon summarized the allegations of the complaint and then found that, "On its face the complaint shows that this action does not arise under

the Constitution or any law of the United States.” (T.R., 16.) The Court then proceeded to develop this theory and, as indicated, ordered the action dismissed for lack of jurisdiction.

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### **ARGUMENT.**

As indicated above, the decision of the Court below appears to have been based upon a theory somewhat different from that advanced in the motion to dismiss. In this argument we shall consider first the reasoning and authorities cited in the opinion of the Court below as the basis for its ruling and endeavor to establish that on its own grounds the Court’s opinion was erroneous and should be reversed. We shall then examine the authorities cited by appellees in support of their motion to dismiss and endeavor to establish that they are not well taken. We shall thereupon urge upon this Court a reversal of the order below with a clear expression of its opinion that not only is there a federal question here presented but that the Court below does have jurisdiction in all respects as that question is raised by the motion to dismiss so that the matter may be remanded to the trial court with instructions to proceed on the merits.

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#### **I. THERE IS A FEDERAL QUESTION PRESENTED.**

##### **A. THE CASES CITED BY THE DISTRICT COURT.**

In support of its assertions that no federal question was presented, the Court below cited *Leather Manufacturers Bank v. Cooper*, 120 U.S. 778, 7 S. Ct.

777, 30 L. Ed. 816 (1887), and *Campbell v. Chase National Bank*, 71 F. (2d) 669 (C.C.A. 2, 1934). Both of these cases are clearly distinguishable.

*Leather Manufacturers Bank v. Cooper*, *supra*, was an action brought in the state court by Cooper against the bank for the purpose of recovering a balance due to Cooper on an open account. The bank had been organized under the provisions of the National Banking Act and it removed the suit to the federal court on the ground that since it was a national bank the suit was one arising under the laws of the United States. Cooper's motion to remand was granted and the Supreme Court affirmed.

The Act of July 12, 1882, which provided for the extension of the corporate existence of national banks, contained the following language with respect to the jurisdiction of federal courts:

"\* \* \* the jurisdiction for suits hereafter brought by or against any association established under any law providing for national banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking associations may be doing business when such suits may be begun; and all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed."  
(7 S. Ct. 777.)

In affirming the order granting the motion to remand, the Supreme Court pointed out that this statute

repealed "in express terms" all laws inconsistent with its provisions and that it enacted that jurisdiction for suits thereafter brought by or against national banks would be the same as the jurisdiction for suits by or against banks not organized under any federal laws. The court said:

"This was evidently intended to put national banks on the same footing as the banks of the state where they were located for all the purposes of the jurisdiction of the courts of the United States." (7 S. Ct. 778.)

It is true that under earlier federal statutes federal and state courts had had concurrent jurisdiction of suits involving national banks. However, as the court pointed out:

"\* \* \* the Act of 1882 provided, in clear and unmistakable terms that the courts of the United States should not have jurisdiction of the suits thereafter brought \* \* \* The provision is not that no such suit shall be brought by or against such a national bank in a federal court, but that a federal court shall not have jurisdiction. This clearly implies that such a suit can neither be brought nor removed there; for jurisdiction of such suits has been taken away, unless a similar suit could be entertained by the same court by or against a state bank in a like situation with the national bank. Consequently, so long as the Act of 1882 was in force, nothing in the way of jurisdiction could be claimed by a national bank because of the source of its incorporation." (7 S. Ct. 778.)

It is clear that this decision is no authority for the ruling of the court below in the instant case. In the

*Leather Manufacturers' Bank Case* the federal courts were bound by a statute which in unmistakable terms deprived them of jurisdiction. Thus, even though a federal question might have been presented by virtue of the fact that the defendant bank was organized under a federal statute (a question which the Court did not have to decide), jurisdiction was specifically taken from the federal courts by the statute cited. There is, of course, no such statute applicable to the instant case and consequently no guidance can be obtained from the decision in the *Leather Manufacturers' Bank Case*. On the contrary, in the case now before the Court, there is a specific claim of right arising from a federal statute, to-wit: the Act of June 28, 1940.

*Campbell v. Chase Nat. Bank*, *supra*, was an *equity* action brought in the federal district court by Campbell against the bank to restrain the bank from transferring gold bullion. The complaint was dismissed for want of jurisdiction and the circuit court affirmed. The facts indicated that Campbell owned several marked bars of gold bullion which he had delivered to the bank for safekeeping and that on September 13, 1933 the bank informed him that it was required to surrender such bullion to the United States Treasury because of, and pursuant to, an executive order issued by the President of the United States. On September 16, 1933 Campbell demanded the delivery of the bullion to him, which demand was refused, and thereupon the suit was started.

The theory of plaintiff's suit was that he was entitled to relief because of the threatened misappro-

priation of his bullion and because of the practical disappearance of his opportunity to possess gold bullion due to the allegedly unconstitutional order of the government. The court in affirming the decision below pointed out that in so far as plaintiff sought to establish the existence of a federal question he did so by anticipating a defense based on the statute upon which the executive order was predicated. The court clearly stated as follows:

“\* \* \* appellant’s (plaintiff’s) ownership with right of possession is not dependent upon the federal law or constitution. [citing cases] \* \* \* Jurisdiction is claimed solely on the ground that the cause of action arose under the Constitution and laws of the United States. *The statute is asserted to be unconstitutional.* The general rule is that, when it appears from the bill of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States and such federal claim is not merely colorable and rests upon a reasonable foundation, the court has jurisdiction. What constitutes a cause arising under the laws of the United States has been pointed out by the courts. In *First National Bank v. Williams*, 252 U.S. 504, 512, 40 S.Ct. 372, 374, 64 L.Ed. 690, it was said:

‘One does so arise where an appropriate statement by the plaintiff, *unaided by any anticipation or avoidance of defenses*, discloses that it really and substantially involves a dispute or controversy respecting the validity, construction or effect of an act of Congress. If the plaintiff thus asserts a right which will be sustained by one construction of the law, or de-



feated by another, the case is one arising under that law.'

"Here the claim is colorable, *it anticipates a defense*, for the claim necessarily rests upon the contention that whatever money appellant might recover *at law* could not repurchase gold bullion *because the statutes and orders make purchases impossible*. *L. & N. R.R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 43, 53 L.Ed. 126; *Taylor v. Anderson*, *supra*. [234 U.S. 74, 34 S.Ct. 724, 58 L.Ed. 1218]. The validity or invalidity of the statute and orders does not affect the jurisdiction. If valid, no cause for a federal suit exists; if invalid, a gold purchase was possible. It could be replaces. The cause of suit cannot depend upon the validity of the statute." (71 F.(2d) 670.) (Italics supplied.)

The *Campbell Case* is thus seen to be authority only for the proposition that a federal question arises when it appears from the face of the complaint, *unaided by the anticipation or avoidance of defenses*, that the suit is one arising under the Constitution or laws of the United States. That, of course, is precisely the situation in the instant case. Not only does appellant allege in the first paragraph that the suit arises under the Constitution and laws of the United States, but he alleges in the seventh paragraph just which one of the laws of the United States is involved and he alleges in the eleventh paragraph what rights he is claiming under that law and how the action of appellees constituted a violation of that law and of those rights. Appellant nowhere anticipates any de-

fenses or seeks to project the existence of a federal question upon such anticipated defenses. Consequently, the rule of the *Campbell Case* is not applicable to the instant proceeding.

The Court below further stated that "To come within the jurisdiction of the District Court on the basis pleaded more is required than that the right sought to be enforced originated in a federal law." (T.R., 17), and, as authority, cited *Cook County v. Calumet, etc., Co.*, 138 U.S. 635, 11 S.Ct. 435, 34 L.Ed. 1110 (1891). With this general proposition of law, appellant has no quarrel. Appellant believes that his complaint shows that more is involved in this proceeding than the fact that the right sought to be enforced originated in a federal law. Not only did the right originate in a federal law but also the basis of the action arose out of an alleged violation of that law by the appellees. There is also involved an implicit\* conflict between the parties with respect to the construction of that law. Appellant contends that the information given by the government officers of the reasons for their discharge of appellant did not meet the test of the

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\*This conflict is *implicit* rather than *explicit* because in the present state of the pleadings it is not clear what the appellees' position is or will be with respect to the question of whether or not the statement of the officer set forth in paragraph VIII of the complaint (T.R., 5-6) constitutes the "full" information required by the statute. It is appellant's contention for the reasons set forth in paragraphs X, XI, and XII, of the complaint (T.R., 7-9) that he was not "fully informed" of the reasons for his discharge whereas it is apparent from the entire record and particularly from the opening allegations of paragraph X of the complaint that appellees contend that he was fully informed. There is thus raised a conflict as to the construction or effect of the federal statute involved.

statute that he be “fully informed” of the reasons thereof while appellees contend that it did.

That the instant case involves the “more” which the trial court required as a basis for federal jurisdiction, is further seen in an analysis of the *Cook County Case* and a comparison of that case with the instant one.

*Cook County v. Calumet, etc., Co., supra*, was an action of ejectment brought in the state court. The question involved the title to certain land which originally was vested in the United States. By an act of Congress in September of 1850, the federal government granted this land to the State of Illinois. By an act of the Illinois legislature in 1852, amended in 1854, this land was granted to the county in which it was situated but it was provided that if any of the lands had been sold by the United States since the act of 1850, the county should convey such land to the purchasers. In this action the state court held that as the land in question had been sold by the United States before the passage of the bill by the Illinois legislature, the county had acquired no beneficial interest in the land.

On a writ of error, the Supreme Court pointed out that the judgment of the state court holding that the county had acquired no beneficial interest to the land, “proceeded wholly upon the construction of the terms and conditions of the grant of the state to the county by the act of 1852, and as amended by the act of 1854, and the validity of those enactments was not drawn in question.” (11 S.Ct. 440.)

The Supreme Court said further:

“There was no decision against claim or title asserted under the United States, but simply that the county did not obtain title under the grant of the state; that the Act of 1852 imposed a positive duty on the county to transfer such title as it acquired to the purchaser from the United States, and that where lands had been bought in good faith from the United States, the title to such lands did not become vested in the county but passed to the purchaser under his entry. This construction by the state court of the laws of the state is controlling in the premises. [Citing cases.]

\* \* \* \* \*

“As the acts of congress referred to in the first and second errors assigned did not purport to vest title to swamp lands in cook or any other county, and the court only passed upon the alleged grant by the State, we are unable to perceive that any federal question was, in this regard, necessarily or in fact decided.” (11 S.Ct. 440.)

It is clear that in the *Cook County Case* what was involved was the construction by the state court of a state statute and nothing more. In the instant case, of course, there is nothing of this nature involved. While the basis for the federal claim in the *Cook County Case* was remote, in the instant case it is direct. In the instant case appellant relies entirely upon the Act of June 28, 1940, and directly alleges its violation by the appellees. In the *Cook County Case* plaintiff did not rely upon any federal statute

but relied exclusively upon a state enactment. Clearly the cases are distinguishable, and furthermore, the disparity between them shows how definitely there is involved in the instant case a federal question.

The court below cited a series of cases for the proposition that, "To arise under a law of the United States an action must involve a controversy respecting the validity, construction or effect of the law pleaded upon the determination of which the result would depend." (T.R., 17.) Here again appellant has no quarrel with this general statement of law. We believe that the record in the instant case shows that there is a controversy respecting the construction or effect of the law pleaded and that if appellant's interpretation prevails, he will be entitled to the relief sought since it will be determined that he did not receive the full information required by the act, his discharge will be held to have been unlawful, and he will be entitled to reinstatement with back pay; whereas if appellees' interpretation prevails, it will be found that appellant did receive the full information required by the act, that his discharge was lawful, and that he is entitled to no relief. However, in order again to show the distinctions between the case at bar and the cases relied upon by the district court to support its opinion, we will analyze those cases at this point.

*Shulthis v. McDougal*, 225 U.S. 561, 32 S.Ct. 704, 56 L.Ed. 1205 (1912), was an action brought in the federal court for the purpose of determining conflicting claims to a tract of land allotted to the Creek nation. The trial court entered a decree for the de-

pendants which was affirmed by the Circuit Court of Appeals. Plaintiffs appealed to the Supreme Court and defendants moved to dismiss the appeal on the ground that judgments or decrees of the Circuit Courts were final in all cases in which federal jurisdiction was dependent entirely upon diversity of citizenship. In opposing the motion to dismiss the appellants maintained that the case arose under certain laws of the United States and therefore was not one in which jurisdiction depended *entirely* upon diversity of citizenship. The appeals were dismissed, the Supreme Court holding that this cause did not arise under the laws of the United States to which appellant had referred.

After stating the rules by which jurisdictional requirements must be tested (e.g., that they must be determined from the complainant's statement of his own cause of action as set forth in his bill without reference to the other pleadings; that jurisdiction may not be inferred argumentatively, but must be affirmatively and distinctly set forth; and that the suit must really and substantially involve a controversy respecting the validity, construction or effect of a federal statute), the court considered the contention of appellants in the case before it. Appellants directed attention to certain federal statutes relating to the allotment of lands of the Creek nation, the leasing and alienation thereof, and the rights of the Indians thereunder. Having pointed this out the court said:

*"\* \* \* but the bill makes no mention of those statutes or of any controversy respecting their*

validity, construction or effect. Neither does it by necessary implication point to such a controversy. \* \* \* So, looking only to the bill as we have seen that we must, it cannot be held that the case as therein stated was one arising under the statutes mentioned. As was said in *Blackburn v. Portland Gold Min. Co.*, 175 U.S. 571, 44 L.ed. 276, 20 Sup. Ct. Rep. 222, 21 Mor. Min. Rep. 358, a controversy in respect to lands has never been regarded as presenting a federal question, merely because one of the parties thereto has derived his title under an act of Congress." (32 S.Ct. 706-7.) (Italics supplied.)

Thus it is clear that the decision in the *Shulthis Case* is simply authority for the proposition that *when plaintiff's pleading fails to specify the federal statute under which he claims his rights, it cannot be said any federal question exists.* However, as we have pointed out above, and as the record now before the court shows, *the complaint in the instant case clearly and unmistakably not only identifies, cites and quotes the statute upon which it relies, but sets forth the facts which are alleged to constitute its violation.* For these reasons we believe that the instant case is clearly distinguishable from the *Shulthis Case* relied upon by the district court.

*In re Winn*, 213 U.S. 458, 29 S. Ct. 515, 53 L. Ed. 873 (1909), was an action in the state court against an interstate express company for damages resulting from negligent transportation. The shipment was from a point in Iowa to a point in Nebraska. The defendant removed to the federal court and plaintiff's

motion to remand was denied. Plaintiff thereupon brought this action, which was an original application for a writ of mandamus, to compel the federal district judge to remand the case. The petition was granted.

The basis for the original removal petition was that the suit was one arising under the laws of the United States. However, the court analyzed the defendant's removal petition as follows:

“In substance the allegations of the petition for removal are, that the *defendant* was subject to the federal laws to regulate commerce, and that, *under those laws, the defendant had a defense in whole or in part to the cause of action stated in the declaration.*” (29 S. Ct. 516.) (Italics supplied.)

The Supreme Court invoked the familiar rule that a suit arises under the laws of the United States only when plaintiff's statement of his own cause shows that it is based upon federal rules and that it is not enough that it appears that the *defendant* may find in the federal constitution or laws some ground of defense. Therefore, since the cause of action itself was not based upon any law regulating interstate commerce, or upon any other law of the United States, the case could neither have been brought originally in the federal court nor removed to it.

Again the distinction between this case and the case at bar is obvious. In the cited case the contention that there was federal jurisdiction was predicated upon an anticipated defense. In the instant case federal jurisdiction is not predicated upon any such



thing; it is clearly and exclusively predicated upon the allegations of the complaint which have already been discussed.

*Gully v. First Nat. Bank*, 299 U.S. 109, 57 S. Ct. 96, 81 L. Ed. 70 (1936), was a suit by a state tax collector for the purpose of recovering taxes due the state. It appears from the complaint that in June of 1931 the assets of a national banking association were conveyed to the defendant under contract whereby the debts and liabilities of the association were assumed by the respondent which covenanted to pay them. Among these debts were taxes owing to the state. The new bank, in violation of its covenant, failed to pay these taxes and this suit was commenced in the state court. The bank filed a removal petition on the ground that the suit arose under the constitution or laws of the United States. The state court made an order accordingly and the federal district court denied a motion to remand. After trial on the merits the complaint was dismissed and the circuit court affirmed the judgment of dismissal, overruling the objection that the case was one which was triable in the state court.

The decision of the circuit court was put upon the ground that the power to tax the shares of a national bank had its origin and measure in the provisions of a federal statute and that by necessary implication plaintiff counted upon that statute in suing for the tax.

In reversing the Circuit Court of Appeals the Supreme Court, speaking through Mr. Justice Cardozo, first analyzed the familiar principles which

determine how and when a case arises under the constitution or laws of the United States. The court pointed out that

“To bring the case within the statute a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff’s cause of action. [Citing cases.] The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. [Citing cases.]” (57 S. Ct. 97.)

It is clear that this test is met in the instant case. It is also clear that the Supreme Court did not find that the test was met in the *Gully Case* because that case presented a factual situation dissimilar to the one at bar. After enunciating the principle discussed above, the court weighed the case against it and failed to find in the pleadings the elements of a federal question. It said, in the first place that

*“The suit is built upon a contract which in point of obligation has its genesis in the law of Mississippi. A covenant for valuable consideration to pay another’s debts is valid and enforceable without reference to a federal law. For all that the complaint informs us, the failure to make payment was owing to a lack of funds or to a belief that a stranger to the contract had no standing as a suitor, or to other objections non-federal in their nature. There is no necessary connection between the enforcement of such a contract according to its terms and the existence of a controversy arising under the federal law.”* (57 S. Ct. 98.) (Italics supplied.)

In the second place the court pointed out that the argument of the defendant bank that the taxes are not valid debts unless lawfully imposed and that they cannot be lawfully imposed unless they are permitted under federal law, since the bank was a national bank, was not a valid argument, because "not every question of federal law emerging in a suit, is proof that federal law is the basis of the suit." (57 S. Ct. 99.) The court said that *the tax was imposed under state statute* and that while it must be consistent with federal statutes, *the federal law did not attempt to impose it or to confer upon the tax collector authority to sue for it.*

As the cornerstone of his argument, Mr. Justice Cardozo recognized that the right sought to be established is one that is created *by the state statute.*

"If there were no federal law permitting the taxation of shares in national banks, a suit to recover such a tax would not be one arising under the Constitution of the United States, though the bank would have the aid of the Constitution when it came to its defense. *Tennessee v. Union & Planters' Bank*, supra [152 U. S. 454, 14 S. Ct. 654, 38 L. Ed. 511]; *Sawyer v. Kochersperger*, 170 U. S. 303, 18 S. Ct. 946, 42 L. Ed. 1046; *Arkansas v. Kansas & Texas Coal Co.*, 183 U. S. 185, 22 S. Ct. 47, 46 L. Ed. 144; *Louisville & Nashville R. Co. v. Mottley*, supra [211 U. S. 149, 29 S. Ct. 42, 53 L. Ed. 126]. That there is a federal law permitting such taxation does not change the basis of the suit, which is still the statute of the state, though the federal law is evidence to prove the statute valid." (57 S. Ct. 99). (Italics in original.)

The tax collector will have to prove that the state law has been obeyed before the court can reach the question as to whether there is anything in its provisions or in any administrative conduct under it which is inconsistent with federal law.

“The most one can say is that a question of federal law is lurking in the background, just as farther in the background there lurks a question of constitutional law, the question of state power in our federal form of government. A dispute so doubtful and conjectural, so far removed from plain necessity, is unavailing to extinguish the jurisdiction of the states.” (57 S. Ct. 99-100.)

In our case the question of federal law is not merely “lurking in the background.” It is in the direct forefront of the case, it is the basis of the case. We have no question of how far behind “state action” one must look to reach the question of federal law. There is no state action here. There is here an alleged violation by federal officers of a federal statute. It seems to us that not only is the distinction between our case and the *Gully Case* obvious, but that a consideration of the rationale of *Gully* and these other cases we are now considering points out how clear our case does in fact present a federal question.

*Marshall v. Desert Properties Co.*, 103 F. (2d) 551, (CCA 9, 1939), was an action brought in the district court to quiet title to certain mining claims. The district court dismissed the action on the ground that no federal question was raised and plaintiffs appealed.

This court, speaking through Judge Stephens, analyzed the complaint and pointed out that it contained in addition to allegations respecting plaintiff's claim, other allegations setting up the nature of defendant's claim and the alleged invalidity thereof. These latter allegations were bottomed upon a federal statute which was plaintiff's basis for his claim of federal jurisdiction. The court pointed out that in an action to quiet title the nature of the adverse claim, its source and origin are immaterial, consequently these allegations of the bill were surplusage and could not properly be used as a basis for conferring jurisdiction upon a federal court. Since it was the unnecessary allegations which gave rise to the claim that the action arose under federal law, this court had no difficulty in finding that the district court was correct in dismissing the action for want of jurisdiction.

In the instant case there is no claim made by the government, nor is there anything in the district court's opinion to indicate, that any of the allegations in the complaint with respect to the federal statute upon which the appellant relies and its violation are surplusage and should therefore be stricken. On the contrary, if appellant has a cause of action at all, he has it under the basis of this federal statute and consequently it is apparent that there is federal jurisdiction.

This court further pointed out in the *Marshall Case* that:

“Where there is no dispute between the parties as to the meaning of any Federal law, but the case involves only issues of fact, the case is not one arising under the constitution or a law or a treaty of the United States, although the respective interests are titles of the parties derived through such constitution, law or treaty. [Citing cases]. We do not think that there is a substantial dispute between the parties as to the meaning of the Mining Law involved.” (103 F. (2d) 552-3.)

The instant case, of course, involves much more than an issue of fact between the parties. There is, as appears from the pleadings, an issue with respect to the application and construction of the federal statute. Appellant contends that the construction which the government places upon the words “fully informed” in the statute is an improper one while the government contends that it is proper. This raises more than an issue of fact; it raises an issue of law concerning the application and construction of a federal statute which issue can and must be resolved only in a federal court.

*Chaskin v. Thompson*, 143 F. (2d) 566 (CCA 9, 1944), was an action instituted in the state court for damages resulting from defendant’s interference with plaintiff’s business. Defendant removed the proceeding to the federal district court and plaintiff’s motion to remand was denied. On plaintiff’s appeal, the district court was reversed and instructed to remand the case to the state court.

The complaint alleged that the defendant had wrongfully and maliciously induced plaintiff's customers to breach contracts made with the plaintiff by falsely representing that the defendant was an employee of the United States Department of Agriculture, and that as such he had the power to cause plaintiff's customers great loss, and that he would do so unless they breached the contracts. This court, again speaking through Judge Stephens, held that such an action was not an action against an employee of the United States but was an ordinary action in tort against the defendant individually and was within the jurisdiction of the state court. The district court had held that the action was one against the defendant in his capacity as an employee of the United States and that consequently it had jurisdiction. Of this this court said:

"The district court was mistaken. *The complaint is drawn as an ordinary action in tort*, the subject matter and the parties falling solely within the jurisdiction of the state court unless there is diversity of citizenship or unless the action arises under the Constitution and laws of the United States. Since diversity is not in the case, the question here turns upon whether or not the cause arises under the Constitution or laws of the United States." (143 F. (2d) 568.) (Italics supplied.)

This court then went on to consider the various principles of law which have been enunciated with respect to when and under what circumstances a cause arises under the Constitution and laws of the United States.

It considered many of the cases herein already referred to and reiterated the conclusion that a suit arises under the laws of the United States only when it so appears from the plaintiff's own statement of his case unaided by any defenses which may subsequently arise. It then said:

"It seems clear that *appellant in his complaint relies wholly upon his state tort action, plainly alleging that everything complained of was the act of the individual*. The pleader alleges that the defendant-appellee acted unlawfully, wrongfully, intentionally and maliciously, and that he well knew that he had no lawful right to do as he is alleged to have done. The mere allegation in the complaint that defendant represented to the dealers that he was acting as an agent of a department of the government does not constitute the action one under the Constitution or laws of the United States. And, as has been seen by the authorities above quoted and cited, since the complaint does not lay the jurisdiction in federal court, such jurisdiction cannot be created by subsequent pleading or proof." (143 F. (2d) 569-70.) (Italics supplied.)

In the *Chaskin Case* this court correctly analyzed plaintiff's complaint and determined from that analysis that the basis for the cause of action was the ordinary tort law of the state. A similar analysis of the complaint in the instant case must convince the court that the basis for a cause of action, if one there be, is a federal statute which is alleged to have been violated by federal officers to the deprivation of appellant's constitutional and statutory rights. Obvi-



ously, there is no state jurisdiction here. There must be federal jurisdiction.

*Barnhart v. Western Maryland Ry. Co.*, 128 F. (2d) 709 (CCA 4, 1942), was an action by a committee of employees against the railway company in the nature of a bill in equity seeking an injunction, an accounting and a determination of plaintiffs' status as employees of the railway company. It appeared from the complaint that under the provisions of the Transportation Act of 1920 (45 USC 131) a Railroad Labor Board was created for the purpose of promoting the amicable adjustment of disputes between railroads and their employees; that pursuant to proceedings had before the Board and orders issued by it, the defendant railroad had accepted certain rulings of the Board and had put them into effect so that they constituted contracts between the railroad and its employees, and that the railroad, in violation of these contracts, had dismissed certain of its employees.

The district court granted a motion to dismiss the complaint on the grounds that no federal question was presented. On appeal, the circuit court examined the complaint carefully for the purpose of determining whether or not the controversy arose under the laws of the United States since there was no question of diversity. The court analyzed the statute which created the Railroad Labor Board and pointed out that it differed radically from such legislation as the National Labor Relations Act or the Fair Labor Standards Act in that there was nothing in the rail-

road statute “\* \* \* on which one could base a cause of action in a federal court by employees for damages sustained by a wrongful discharge. Accordingly \* \* \* the decision of the Board was not binding on the appellee (the railway company) and did not constitute an enforceable adjudication of its obligations.” (128 F. (2d) 712-3.)

The court said that this brought it to the pivotal point of the case which had been stated by the court below as follows:

“\* \* \* clearly it cannot be said that the instant case “involves a dispute or controversy respecting the validity, construction or effect” of that statute [Transportation Act of 1920], upon the determination of which the result depends. The present complaint does not call upon the court to now determine either the validity, construction or effect of any provision of the Act creating the Railroad Labor Board. Such questions have been heretofore determined by the Supreme Court, and it is not my understanding from the argument of counsel for the plaintiffs that there is any effort in this case to distinguish or avoid the effect of those decisions. What is here involved is merely a controversy between the parties over an alleged wrongful discharge of the plaintiffs from employment existing after the passage of an Act of Congress, and possibly affected as to some of its working conditions by the published decisions of the Labor Board; *but the right of action asserted does not arise from any provision of the statute*, and the determination of the controversy does not depend upon any disputed validity, construction or effect of the

statute. In other words, the employment may have been inspired by the Act, but *a right of action for the defendant's alleged breach of the contract does not arise from the Act; but only from the subsequent contractual relations of the parties. The wrongful breach of such relations does not confer federal court jurisdiction unless there is diverse citizenship'.*" (128 F. (2d) 713.) (Italics supplied.)

The court then went on to consider the authorities, to many of which we have already referred, and stated its conclusion that the case, "at best, has merely its background in the existence of a federal law, but this origin alone is insufficient to invoke the jurisdiction of the federal courts." This was so because, "*A determination of the alleged rights of the appellants, here, involves, we think, no interpretation of either a federal statute or the terms of a decision of the Board.*" The court pointed out that after the Board had acted the alleged rights of the parties were incorporated in an agreement and, "thus became a matter of contract between the parties, and any rights of the appellants, in this connection, arose, not out of the statute that set up the Board, not out of the action of the Board in promulgating the rules, but out of the contract itself." (128 F. (2d) 714.) (Italics supplied.)

As we have already pointed out the alleged rights of appellant, if any he has, arise squarely out of the federal statute, not out of any contract or any other source. It is apparent to us that the *Barnhart Case*

is not only distinguishable from the instant case, but that a careful reading of it shows how definitely and clearly the pleading in the instant case does raise a federal question.

*Miller v. Long*, 152 F. (2d) 196 (CCA 4, 1945), was an action brought in the district court seeking declaratory relief to the effect that a certain note and mortgage were null and void. Defendants moved to dismiss for lack of jurisdiction and, since no diversity of citizenship existed, it was necessary to establish that the suit arose under the constitution or laws of the United States in order to give jurisdiction to the district court. The district court found that this was no such suit and dismissed on that ground only. On appeal the circuit court affirmed.

The complaint alleged that plaintiff contracted with defendant that the latter would supply him with a home, the agreed cost of which was to be financed by an FHA loan, and that defendant was guilty of fraud in the transaction, and particularly in the making of false statements to the FHA with respect to the existence of incumbrances upon the property and with respect to the extent of certain down payments which were to be made. Plaintiff contended that the fraud was not only against him but was against the FHA and that the false statements violated certain criminal provisions of the National Housing Act, and that since the decision required an interpretation of that act, a substantial federal question was involved. The court, after reviewing the allegations of the complaint, said:

“We do not find that the existence of a federal question is shown on these facts. If the facts alleged are correct, certainly a grievous fraud has been committed, which merits the closest investigation by the federal authorities, but that fact alone does not make a federal question out of *a suit to annul the fraudulently procured second mortgage.*” (152 F. (2d) 197.) (Italics supplied.)

After reviewing the rules with respect to the existence of a federal question the court said:

“Plaintiff can obtain the complete relief sought in proceedings already commenced in the state courts and we are unable to find any substantial dispute as to the interpretation of any section of the National Housing Act (the only federal statute here involved) as a material factor in proceedings *to set aside a fraudulently procured second mortgage.* \* \* \*

“Reduced to its essentials, plaintiff’s case is one of fraud in the factum, that he was led to sign the instruments involved by the false and fraudulent statements of Long (defendant) as to the nature and contents of these instruments. *Plaintiff’s civil rights derive solely from the State law;* the National Housing Act is silent in this field. Nor is plaintiff helped by virtue of the fact that Long may have committed a crime against the United States. That is *res inter alios acta*. There is no merit in plaintiff’s contentions that a federal question is here present because the case involves the civil consequences of a federal crime, or because a question of ‘federal policy’ arises for the solution of which resort

must be had to the so-called 'federal common law'." (152 F. (2d) 197-8.) (*Italics supplied.*)

This case, like *Chaskin v. Thompson*, *supra*, involved nothing more than an ordinary tort action under state law and consequently the court was correct in refusing to take jurisdiction. However, that is not the problem presented by the pleading in the instant case and we think that the *Miller Case* is clearly distinguishable.

The district court also cited the case of *Bell v. Hood*, 150 F. (2d) 97 (CCA 9, 1945). In that case this court had affirmed an order of the district court dismissing a suit for want of jurisdiction on the ground that the action was not one that arose under the Constitution and laws of the United States. However, the Supreme Court of the United States granted *certiorari*, 326 U. S. 706, 66 S. Ct. 98, 90 L. Ed. 417 (1945), and reversed this court and the district court, 327 U. S. 678, 66 S. Ct. 773, 90 L. Ed. 939 (1946).

The complaint therein alleged that petitioners were damaged as a result of the action of certain agents of the Federal Bureau of Investigation in imprisoning them in violation of their constitutional rights to be free from deprivation of liberty without due process of law, and in subjecting their premises to search and their possessions to seizure in violation of the constitutional right to be free from unreasonable searches and seizures.

The argument in support of the ruling of the lower courts was that the complaint merely stated a cause

of action for the tort of trespass which was made actionable by state law and therefore it did not raise any federal question. The Supreme Court pointed out that a mere reading of the complaint refutes this contention. In this connection we may observe that a mere reading of the complaint in the instant case should also refute that contention as it is made here.

The opinion of the Supreme Court is so well reasoned and is, so far as we know, the latest definitive word of that court on the subject that we feel constrained to quote from it at some length:

“Whether or not the complaint as drafted states a common law action in trespass made actionable by state law, it is clear from the way it is drawn that petitioners seek recovery squarely on the ground that respondents violated the Fourth and Fifth Amendments. It charges that the respondents conspired to do acts prohibited by these amendments and alleges that respondents’ conduct pursuant to the conspiracy resulted in damages in excess of \$3,000. It cannot be doubted therefore that it was the pleaders’ purpose to make violation of these Constitutional provisions the basis of this suit. Before deciding that there is no jurisdiction, the district court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. For to that extent ‘the party who brings a suit is master to decide what law he will rely upon, and \* \* \* does determine whether he will bring a “suit arising under” the \* \* \* [Constitution or laws] of the United States by his declaration or bill.’ *The Fair v. Kohler Die & Specialty Co.*, 228 U.S.

22, 25, 33 S. Ct. 410, 411, 57 L. Ed. 716. Though the mere failure to set out the federal or Constitutional claims as specifically as petitioners have done would not always be conclusive against the party bringing the suit, where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit. Thus allegations far less specific than the ones in the complaint before us have been held adequate to show that the matter in controversy arose under the Constitution of the United States. *Wiley v. Sinkler*, 179 U. S. 58, 64, 65, 21 S. Ct. 17, 20, 45 L. Ed. 84; *Swafford v. Templeton*, 185 U. S. 487, 491, 492, 22 S. Ct. 783, 784, 785, 46 L. Ed. 1005. The reason for this is that the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy." (66 S. Ct. 775-6.)

This analysis, applied to the pleadings now before the court, will make it apparent that appellant has brought a suit arising under the Constitution and the laws of the United States by the allegations of his complaint. He has specifically alleged a violation by government officials of a statutory duty, which violation has deprived him of rights which are granted to him by the statute and of other rights which are guaranteed to him by the Constitution of the United States. Certainly the reasoning of the Supreme Court in *Bell v. Hood*, would indicate that appellant *has* raised a federal question. With respect to the argu-



ment that there is no jurisdiction because the complaint may fail to state a cause of action, the Supreme Court in *Bell v. Hood* said:

“Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. *Swafford v. Templeton*, 185 U. S. 487, 493, 494, 22 S. Ct. 783, 785, 786, 46 L. Ed. 1005; *Binderup v. Pathe Exchange*, 263 U. S. 291, 305-308, 44 S. Ct. 96, 98-99, 68 L. Ed. 308.<sup>2\*</sup> The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly in-

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\*Footnotes 2 to 7 which follow are the Court's.

<sup>2</sup>For other cases discussing the distinction between questions going to the merits and those going to the jurisdiction, see the following: *Illinois Central Railroad Co. v. Adams*, 180 U.S. 28, 21 S.Ct. 251, 45 L.Ed. 410; *Geneve Furniture Mfg. Co. v. S. Karpen & Bros.*, 238 U.S. 254, 35 S.Ct. 788, 59 L.Ed. 1295; and see *Nashville & St. Louis Ry. v. Taylor*, C.C., 86 F. 168.

substantial and frivolous. The accuracy of calling these dismissals jurisdictional has been questioned. *The Fair v. Kohler Die & Specialty Co.*, supra, 228 U. S. at page 25, 33 S. Ct. at page 411, 57 L. Ed. 716. But cf. *Swafford v. Templeton*, supra.

“But as we have already pointed out the alleged violations of the Constitution here are not immaterial but form rather the sole basis of the relief sought. Nor can we say that the cause of action alleged is so patently without merit as to justify, even under the qualifications noted, the court’s dismissal for want of jurisdiction. The Circuit Court of Appeals correctly stated that ‘the complaint states strong cases, and if the allegations have any foundation in truth, the plaintiffs’ legal rights have been ruthless violated.’ [150 F. (2d) 98.] Petitioners’ complaint asserts that the Fourth and Fifth Amendments guarantee their rights to be free from unauthorized and unjustified imprisonment and from unreasonable searches and seizures. They claim that respondents’ invasion of these rights caused the damages for which they seek to recover and point further to 28 U.S.C. §41(1), 28 U.S.C.A. §41(1), which authorizes the federal district courts to try ‘suits of a civil nature’ where the matter in controversy ‘arises under the Constitution or laws of the United States,’ whether these are suits in ‘equity’ or at ‘law.’ Petitioners argue that this statute authorizes the Court to entertain this action at law and to grant recovery for the damages allegedly sustained. Respondents contend that the Constitutional provisions here involved are prohibitions against the federal gov-

ernment as a government and that 28 U.S.C. §41 (1), 28 U.S.C.A. §41(1), does not authorize recovery in money damages in suits against unauthorized officials who according to respondents are in the same position as individual trespassers.

“Respondents’ contention does not show that petitioners’ cause is insubstantial or frivolous, and the complaint does in fact raise serious questions, both of law and fact, which the district court can decide only after it has assumed jurisdiction over the controversy. The issue of law is whether federal courts can grant money recovery for damages said to have been suffered as a result of federal officers violating the Fourth and Fifth amendments. That question has never been specifically decided by this Court. That the issue thus raised has sufficient merit to warrant exercise of federal jurisdiction for purposes of adjudicating it can be seen from the cases where this Court has sustained the jurisdiction of the district courts in suits brought to recover damages for depriving a citizen of the right to vote in violation of the Constitution.<sup>3</sup> And it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution<sup>4</sup> and to restrain individual state officers from

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<sup>3</sup>Wiley v. Sinkler, *supra*; Swafford v. Templeton, *supra*. See also Brickenhouse v. Brooks, C.C., 165 F. 534, 543, in which a similar suit was held to be within the jurisdiction of the federal court.

<sup>4</sup>Philadelphia Co. v. Stimson, 223 U.S. 605, 32 S.Ct. 340, 56 L.Ed. 570; Hays v. Port of Seattle, 251 U.S. 233, 40 S.Ct. 125, 64 L.Ed. 243; Pennoyer v. McConnaughty, 140 U.S. 1, 11 S.Ct. 699, 35 L.Ed. 363; City Railway Co. v. Citizens’ St. Railroad Co., 166 U.S. 557, 17 S.Ct. 653, 41 L.Ed. 1114; City of Mitchell v. Dakota Central Telephone Co., 246 U.S. 396, 407, 38 S.Ct. 362, 365, 62 L.Ed. 793.

doing what the 14th Amendment forbids the state to do.<sup>5</sup> Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies, so as to grant the necessary relief.<sup>6</sup> And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.<sup>7</sup> Whether the petitioners are entitled to recover depends upon an interpretation of 28 U.S.C. §41(1), 28 U.S.C.A. §41(1), and on a determination of the scope of the Fourth and Fifth Amendments' protection from unreasonable searches and deprivations of liberty without due process of law. Thus, the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the district court has jurisdiction. *Gully v. First National Bank*, 299 U. S. 109, 112, 113, 57 S. Ct. 96, 97, 81 L. Ed. 70; *Smith v. Kansas City Title & Trust Co.*, 255 U. S. 180, 199, 200, 41 S. Ct. 243, 244, 245, 65 L. Ed. 577."

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<sup>5</sup>*Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979; see also *Ex parte State of Virginia*, 100 U.S. 339, 346, 347, 25 L.Ed. 676.

<sup>6</sup>*Marbury v. Madison*, 1 Cranch. 137, 162, 163, 2 L.Ed. 60; *Texas & N.O.R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 569, 570, 50 S.Ct. 427, 433, 74 L.Ed. 1034.

<sup>7</sup>See e.g. *Dooley v. United States*, 182 U.S. 222, 21 S.Ct. 762, 45 L.Ed. 1074, and cases cited and discussed at pages 228-230, of 182 U.S., at pages 764-765 of 21 S.Ct.; *Board of Commissioners of Jackson County v. United States*, 308 U.S. 343, 349, 350, 60 S.Ct. 285, 287-288, 84 L.Ed. 313.

We think, as we have pointed out, that all of the cases cited by the district court are quite obviously distinguishable from the case at bar; that a close analysis of them will show this to be the fact; that a consideration of their rationale will show that had a complaint such as the one now before this court been before the courts which decided those cases, it would undoubtedly have been held that there was presented a federal question.

We further believe that the decision of the Supreme Court in *Bell v. Hood*, supra, is clear and controlling on the point. In that case the Supreme Court found the existence of a federal question in the alleged unlawful conduct of the federal officers without any alleged violation of any federal statute. In our case we allege not only unlawful conduct which deprives plaintiff of his constitutional rights but we also allege a violation by the federal officers of a specific federal statute which gives to appellant rights thereunder.

**B. CASES OF THE UNITED STATES SUPREME COURT NOT CITED  
BY THE DISTRICT COURT.**

We have heretofore discussed the cases cited by the district court. We now wish to consider a few of the many cases in which the Supreme Court of the United States has found the existence of a federal question for the purpose of demonstrating that the complaint now before this court is of such a nature as to fit into the general pattern which has been developed by that court.

*Ex Parte Lennon*, 166 U. S. 548, 17 S. Ct. 658, 41 L. Ed. 1110 (1897) involved a petition for a writ of habeas corpus originally filed in the federal court in Ohio. The petition was dismissed and the dismissal was affirmed by the circuit court. The Supreme Court granted certiorari and affirmed the courts below.

The petition alleged that the petitioner was held in custody by the marshal pursuant to an order of the federal court made in a proceeding in which a railway corporation had brought suit against certain individuals to restrain them from interfering with its operations. These individuals had refused to handle the cars of the railway corporation because its employees were not members of an association of locomotive engineers. In the principal action the federal court had enjoined any interference with the operations of the railroad and petitioner was cited for contempt for an alleged violation of the injunction.

In support of his petition for habeas corpus, petitioner argued, among other things, that the injunction was void because in the absence of diversity the federal court had no jurisdiction since the suit did not arise under the Constitution and laws of the United States. With respect to this latter point, the Supreme Court found that the suit did arise under the Constitution and laws of the United States, and in this connection said:

“We think the bill exhibited a case arising under the Constitution and laws of the United States, as it appears to have been brought solely to enforce a compliance with the provisions of the

*Interstate Commerce Act of 1887, and to compel the defendants to comply with such act, by offering proper and reasonable facilities for the interchange of traffic with complainant, and enjoining them from refusing to receive from complaint, for transportation over their lines, any car which might be tendered them. It has been frequently held by this court that a case arises under the Constitution and laws of the United States whenever the party plaintiff sets up a right to which he is entitled under such laws, which the parties defendant deny to him, and the correct decision of the case depends upon the construction of such laws. As was said in Tennessee v. Davis, 100 U. S. 257, 264: 'Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted.'* See also *Starin v. City of New York*, 115 U. S. 257, 6 Sup. Ct. 28; *Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co.*, 112 U. S. 414, 5 Sup. Ct. 208; *Ames v. State of Kansas*, 111 U. S. 462, 4 Sup. Ct. 437; *Railroad Co. v. Mississippi*, 102 U. S. 135." (17 S. Ct. 660.) (Italics supplied.)

In our case as in the case which the Supreme Court was considering in the above decision, we think that the complaint shows that it was brought "solely to enforce compliance with the provisions of" the Act of June 28, 1940, and furthermore, that "the party plaintiff sets up a right to which he is entitled under such laws." As we indicated above (*supra* p. 12), it

must be assumed at this stage of the pleadings that the appellants denied that right to him. The right, of course, is the right to be "fully informed" of the nature of the charges which prompted his dismissal so that he may have an opportunity by proper affidavit to answer such charges and having answered them to the satisfaction of the Secretary involved, be reinstated to his employment. Certainly "the correct decision of the case depends upon the construction" of the statute. It must be determined by the federal court whether or not the statutory requirement of full information was complied with by the defendants.

*Northern Pacific Railway Co. v. Soderberg*, 188 U. S. 526, 23 S. Ct. 365, 47 L. Ed. 575 (1903), was an action to enjoin the removal of granite from certain lands held by the plaintiff under a federal grant. The trial court dismissed the action *on the merits* and its ruling was affirmed by the Circuit Court of Appeals for this circuit. On appeal to the Supreme Court, a motion was made to dismiss the appeal for the reason that, since the jurisdiction of the federal court was invoked upon the ground of diversity of citizenship, the decree of the Circuit Court of Appeals was final under the federal statutes and judicial interpretations as they then existed. The Supreme Court pointed out, however, that in order for the judgment to have finality, it must appear that federal jurisdiction was dependent *entirely* upon diverse citizenship. If there was *any other* basis for federal jurisdiction, the decision of the Circuit Court would



not be final and the motion to dismiss the appeal would have to be denied. That is what happened.

Plaintiff claimed under an act of Congress which incorporated it and gave it power to construct a railroad and granted to it every alternate odd-numbered section of public lands, *not mineral*, on either side of the right of way. Defendant contended that the plaintiff's title was defective because the land in question was granite land and consequently not mineral. Of the issue thus raised, the court said:

“Plaintiff's bill does, indeed, set up a diversity of citizenship as one ground of jurisdiction, but, as it appears that its title rests upon a proper interpretation of the land grant act of 1864 as to the exception of nonmineral lands, there is another ground wholly independent of citizenship under that clause of §1 of the act of 1888 (25 Stat. at L. 433, chap. 866) clothing the circuit court with jurisdiction of all civil suits involving over \$2,000 ‘and arising under the Constitution or laws of the United States.’ If the case made by the plaintiff be one which depends upon the proper construction of an act of Congress, with the contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States. *Doolan v. Carr*, 125 U. S. 618, 31 L. Ed. 844, 8 Sup. Ct. Rep. 1228; *Cooke v. Avery*, 147 U. S. 375, 37 L. Ed. 209, 13 Sup. Ct. Rep. 340. Under the allegations of the bill, the fact that the Land Department had not determined whether the land in question was mineral or nonmineral does not involve a question of fact, as the facts are admitted, but solely a question of law whether land

valuable for its granite is mineral or nonmineral under the terms of the grant. *Morton v. Nebraska*, 21 Wall. 660, 22 L. Ed. 639. The fact that a patent issued pending suit is neither set up in the pleadings nor noticed in the opinion of either court. The motion to dismiss must therefore be denied." (23 S. Ct. 366.)

In this case the Supreme Court found that there was a question arising under the laws of the United States, because there was involved the construction of the federal statute with respect to whether or not the words "not mineral" included the word "granite." Certainly if such a question of the construction of a federal statute can be held to be sufficient for these purposes, the controversy here with respect to whether or not the information given by the federal officers was the full information required by the statute must also raise such a question. It hardly seems reasonable to assume that the Supreme Court would be more likely to find the existence of a federal question in a situation involving property rights of corporations than it would in a situation involving a working man's rights to his employment.

*King County v. Seattle School District No. 1*, 263 U. S. 361, 44 S. Ct. 127, 68 L. Ed. 339 (1923), was an action in the federal court by a school district against a county to recover money allegedly due to the school district under a grant by Congress of funds arising from a forest reserve. Both the district court and this court assumed jurisdiction. On appeal to the Supreme Court, the decrees below were reversed *on*

*the merits.* However, there was also raised the question of federal jurisdiction. With respect to this, the Court said:

“Section 24 of the Judicial Code (Comp. St. §991) provides that the District Courts shall have original jurisdiction where the matter in controversy arises under the laws of the United States. In this case the right and title set up by the appellee depend upon the act of Congress. There is involved the question whether that act permits the money so received by the county to be expended by the county commissioners as directed by state legislation, or requires an equal distribution annually for the benefit of public schools and public roads of the county. Appellee contended for the latter construction, and the courts below sustained its claim. If this is not a correct construction of the act, appellee has no cause of action. See *Northern P. R. Co. v. Soderberg*, 188 U. S. 526, 528, 47 L. Ed. 575, 580, 23 Sup. Ct. Rep. 365; *Shulthis v. McDougal*, 225 U. S. 561, 569, 56 L. Ed. 1205, 1210, 32 Sup. Ct. Rep. 704. The district court had jurisdiction.” (44 S. Ct. 127-8.)

The foregoing three cases are but a few of the many which the Supreme Court has decided upon this question. In all of them the court has found the existence of a federal question when the construction of a federal statute was involved in the action. We submit that the construction of the Act of June 28, 1940, is involved in the case now before the court and upon the reasoning of these cases the court should and must find that a federal question exists.

In addition to these cases, see also *Philadelphia Co. v. Stimson*, 223 U. S. 605, 32 S. Ct. 340, 56 L. Ed. 570 (1912), and *Ickes v. Fox*, 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1937), which cases will be discussed below.

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## II. THE DISTRICT COURT HAD JURISDICTION OF THE ACTION.

In addition to the point made by the district court, *sua sponte* that the suit had to be dismissed because it did not arise under the laws of the United States, the government raised certain other points in its motion to dismiss. We urge upon this court a reversal of the district court not only on the precise point upon which its decision was rendered but also an expression from this court of its views with respect to the other matters raised in the government's preliminary motion so that when the cause is remanded to the district court we may proceed to trial on the merits.

### A. JURISDICTION OVER THE SECRETARY OF THE NAVY.

Appellees contend that the Court lacks jurisdiction over the defendant Forrestal, Secretary of the Navy, as his official residence is in the District of Columbia and said defendant has not consented to be sued in this Court.

The facts as set forth in the complaint disclose a shocking and outrageous disregard of the rights of an American citizen and a violation by Admiral Friedell, Commandant of the Mare Island Navy

Yard and predecessor to the defendant Admiral Klein, of the Act of June 28, 1940, expressly providing that civil service employees discharged pursuant to the provisions of said public law shall be *fully informed* of the reasons for the discharge.

Appellant, a Navy Yard employee for *thirteen* years with *permanent* civil service status and belonging to the Masonic Order and the United Federal Workers of America, C.I.O. (T.R., 3), was summarily discharged from the Mare Island Navy Yark, thereby losing all civil service rights including accrued leave with pay. The only reason given appellant for his removal was a vague and indefinite statement by Admiral Friedell (T. R., 5-6).

Authorities hereinafter set forth hold that, under such facts, suit may be maintained for reinstatement against the subordinate officer who performed the act complained of without joining in the complaint the superior officer. For this reason appellee Forrestal, as Secretary of the Navy, is not a necessary party to the suit. No effort was made to serve the complaint and summons upon appellee Forrestal, as appellant was aware that as the office of the Secretary of the Navy is by statute located in the District of Columbia, and that the said appellee could not be sued in this district without his consent. Appellant, in naming Forrestal as a defendant, did so for the purpose of giving the Secretary of the Navy an opportunity to appear before the court and attempt to defend the failure of his subordinate officer to comply with the requirement of Congress as enunciated in the Act of June

28, 1940. Appellee Forrestal, by his motion to dismiss, has indicated refusal to consent to being a party to this suit and therefore under the authorities he is entitled to be dismissed from the suit.

**B. THE SECRETARY OF THE NAVY IS NOT AN INDISPENSABLE PARTY AND EVEN IF THE COURT HAS NO JURISDICTION OVER HIM, THE ACTION SHOULD NOT BE DISMISSED AS TO ADMIRAL KLEIN, COMMANDANT OF THE MARE ISLAND NAVY YARD.**

In *Neher v. Harwood*, 128 Fed. (2d) 846 (CCA 9, 1942), an action was commenced against the Postmaster of the City of La Verne, California, to enjoin the defendant from carrying into effect a fraud order issued by the Postmaster General. From an order dismissing the complaint an appeal was filed. The first question on appeal that the Circuit Court of Appeals for this Circuit was called upon to decide, was whether or not the Postmaster General was an indispensable party to the suit. In connection with the subject of indispensable parties, the Court stated:

“In view of the fact that there is confusion in courts as to the necessity of joining superior officers when acts of subordinates are sought to be enjoined, we have made a fairly thorough examination of the decisions and opinions upon the subject in an attempt to discover a principle which will largely reconcile them.”

The Court then proceeded to review various decisions on the subject, and concluded that the Postmaster General was an indispensable party. However, it is important to observe that, in its discussion, the

Court recognized that where the superior officer was without authority to act at all in the premises, his actions assuming to authorize action by a subordinate were of no validity and left the subordinate as the actor subject to restraint. Moreover, the Court recognized the power of a court to enjoin a subordinate officer where the action was one to restrain unauthorized action by a government official. It is the position of plaintiff that it is the foregoing rules which apply to the case at bar.

In *Hill v. Darger*, 8 Fed. Supp. 189 (D. C., S. D. Cal.), an injunction was sought against the defendants who were officials authorized to enforce the provisions of a certain license issued by the Secretary of Agriculture. A motion to dismiss was filed on the ground that the Secretary of Agriculture was an indispensable party defendant. The Court found that the license was invalid as to plaintiffs and denied the motion to dismiss. The Court stated:

“It is well settled, of course, that equity will in a proper case restrain officials of the government from acts constituting an invasion of individual rights where such acts are not authorized by statute or where the statute authorizing them is void because in conflict with some provision of the Constitution.”

The Court then concluded:

“One who performs any act violative of individual rights must find statutory warrant for the authority that he attempts to exercise, and in default of such warrant he may be enjoined.”

To the same effect see

*Eastman v. United States*, 28 Fed. Supp. 807  
(D. C., W. D. Wn.);

also

*Colorado v. Toll*, 268 U. S. 228, 45 S. Ct. 505, 69  
L. Ed. 927 (1925).

Applying the rule established in the foregoing authorities, appellee Forrestal, Secretary of the Navy, is not an indispensable party. Admiral Friedell, predecessor to defendant Admiral Klein, had no statutory authority whatsoever to discharge appellant without fully informing him of the reasons for his removal. The discharge under such facts was not authorized by statute. Appellee Admiral Klein as successor to Admiral Friedell "must find statutory warrant for the authority that he attempts to exercise" in refusing to reinstate appellant although demand has been made upon him for reinstatement. The soundness of the rules enunciated in the above authorities is self-apparent. Appellant, a federal civil service employee, has been discharged by the Admiral of the Mare Island Navy Yard. The Navy Yard and the appellee Admiral Klein are within the jurisdiction of this Court. The provisions of the Act of June 28, 1940, abolishing civil service rights during the national emergency were not complied with. As a result thirteen years of labor as a machinist by appellant as well as the protection he had as a permanent civil service employee of the United States were wiped out by a stroke of a pen in the hands of the Commandant of the Navy Yard. In fact, as stated in the complaint,



appellant has been refused accrued leave due to him (T. R. 9-10). Although there has been no compliance with the mandate of Congress as set forth in the statute, appellee Admiral Klein, Commandant of the Mare Island Navy Yard, attempts to avoid righting the grave injustice done appellant by contending that if he wants redress, appellant must go to the District of Columbia and there sue the Secretary of the Navy. Certainly this Court will not countenance such tactics. Appellant, a citizen, a Mason and union member with thirteen years' civil service status, is entitled to his day in Court.

**C. THERE IS NO INTERFERENCE SOUGHT WITH THE DISCRETION OF AN EXECUTIVE OFFICER, FOR THE STATUTE PERMITS OF NO DISCRETION.**

Respondents contended that by the complaint, the court is requested to interfere with the duly exercised discretion of authorized officers.

The authorities cited to support this argument are not in point. On the contrary, the following rule is well established:

“Where a statute vests no discretion in an executive officer but to act under a given set of circumstances, or forbids his acting except upon certain named conditions, a court will compel him to act or to refrain from acting if he essays wholly to disregard the statutory mandate; \* \* \*”

*Adams v. Nagle*, 303 U. S. 532, 541, 58 S. Ct. 687, 693, 82 L. Ed. 999, 1006 (1938).

The foregoing rule is applicable herein. The Act of June 28, 1940, vests no discretion in the executive officer.

The statute states the discharged employee shall "be fully informed of the reasons" for his discharge. The reason therefor being that the statute gives the discharged employee the right, after being *fully* informed, to submit an affidavit "to show why he should be retained and not removed". Merely informing appellant that the reasons for his discharge are that he has "been actively associated with members of and attending meetings of an organization which advocates the overthrow of the constitutional form of government of the United States" is not a compliance with the statute. The stated reasons are too vague and indefinite to enable appellant to prepare and submit the affidavit referred to in the statute to show why he should be retained as a civil service employee and not removed. Unless appellant is informed of the name of the alleged subversive organization, it is obvious he cannot meet the issue presented as he is unable to file an affidavit stating whether he has or has not attended the meetings thereof. Congress recognized the harshness of the law it was passing, giving to an executive officer summary power to take away from federal employees their civil service rights and therefore Congress placed in the statute a safeguard for the protection of the employee, to-wit, that he be fully informed of the reasons for the discharge. Congress then provided that after the employee has been fully informed, he has the right to file an affidavit to show why he should be reinstated. As set forth in the complaint herein, no effort was made by Admiral Friedell, predecessor to appellee Admiral Klein, to comply with the mandate of Congress. Repeated demands of appellant that he

be fully informed of the reasons for his discharge were ignored or refused. To contend that this Court is being requested to "interfere with the duly exercised discretion of authorized officers" totally ignores the language of the statute which vests no discretion in the officer making the discharge.

Appellees rely upon *Ebelein v. United States*, 257 U. S. 82, 42 S. Ct. 12, 66 L. Ed. 140 (1921). In that case the Court stated:

"There can be no question from the findings in this case that the plaintiff had the benefit of a hearing according to the regulations then in force \* \* \* the things required by law and regulations were done, and the discretion of the authorized officers was exercised as required by law. It is settled that in such cases the action of executive officers is not subject to revision in the courts." (42 S. Ct. 12.)

It is the contention of appellant that the "things required by law and regulations" were not done with respect to his discharge and therefore the action of the Admiral of the Mare Island Navy Yard in summarily discharging appellant is "subject to revision in the courts".

In *Hammond v. Hull*, 131 F. (2d) 23 (CCA, D. C., 1942), suit was filed by a foreign service officer against the Secretary of State seeking reinstatement. In discussing the question presented, the Court stated:

"The remedy which, before adoption of the new Rules of Civil Procedure, was known as mandamus, is available under the new rules [Rule 81(b)] and is governed by the same principles as

formerly governed its administration. Those principles may be briefly summarized as follows: (1) The writ should be used only when the duty of the officer to act is clearly established and plainly defined and the obligation to act is peremptory. (2) The presumption of validity attends official action, and the burden of proof to the contrary is upon one who challenges the action. (3) Courts have no general supervisory powers over the executive branches or over their officers, which may be invoked by writ of mandamus. Interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief. (4) When the performance of official duty requires an interpretation of the law which governs that performance, the interpretation placed by the officer upon the law will not be interfered with, certainly, unless it is clearly wrong and the official action arbitrary and capricious. (5) *For it is only in clear cases of illegality of action that courts will intervene to displace the judgments of administrative officers or bodies.* (6) Generally speaking, when an administrative remedy is available it must first be exhausted before judicial relief can be obtained, by writ of mandamus or otherwise.

“The judgment of the District Court dismissing appellant’s complaint must be affirmed *unless the action of appellees was clearly a violation of some provision of law, or unless they failed to observe and carry out the procedure provided by law.*”\* (131 F. (2d) 25.) (Italics supplied.)

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\*The court’s footnotes, citing cases, are omitted.

In *Wilbur v. United States*, 281 U. S. 206, 50 S. Ct. 320, 74 L. Ed. 809 (1930), the Court stated:

“Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command, it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary.” (50 S. Ct. 324.)

In *Farley v. United States*, 92 Fed. (2d) 533 (CCA, D. C., 1937), the court in affirming an order of the district court granting a writ against the Postmaster General and in favor of an employee who had been denied an increased salary grade, relied upon *Wilbur v. United States*, *supra*.

In *Levin v. Farley*, 107 Fed. (2d) 186 (CCA, D. C., 1939), *certiorari* denied, 60 S. Ct. 377, the lower court denied a postal employee's reinstatement. The court on appeal stated the following rule:

“Unless, therefore, an examination of the record shows (a) that the action of the Postmaster General in removing petitioner from office was clearly a violation of some provision of law or (b) that the Postmaster General *failed to observe and carry out the procedure for removal as provided by law*, we must affirm the action of the lower court.” (Italics supplied.)

The complaint herein furnishes a perfect example of the failure to “observe and carry out the procedure for removal” of civil service employees from Navy Yard Departments as provided by law.

In *Borak v. Biddle*, 141 Fed. (2d) 278 (CCA, D.C., 1944), the Court of Appeals held that plaintiff, a civil service attorney, was entitled to a hearing before being dismissed. In remanding the case to the district court with instructions, the Court said:

“Considered in this respect, therefore, it is enough for appellant’s purposes, at least for the time being, that a declaratory judgment should be made by the District Court establishing his right, prior to dismissal, to notice and the sort of hearing provided by the statute.”

It is submitted that appellant herein did not get the “sort of hearing provided by the statute”.

See also

*Philadelphia Co. v. Stimson*, 223 U. S. 605, 32 S. Ct. 340, 56 L. Ed. 570 (1912), *infra*,

and

*Ickes v. Fox*, 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1932), *infra*.

**D. THE AMOUNT CLAIMED IS NOT BEYOND THE JURISDICTION OF THE DISTRICT COURT.**

To support the argument that the amount claimed is beyond the jurisdiction of the court below, respondents cite 28 U.S.C. 41(20) and assert that the suit should be in the Court of Claims.

This subdivision is designated “Suits against the United States.” The United States is not named as a party defendant, and under a separate heading authorities will be cited demonstrating that this is not a suit against the United States. The complaint seeks

reinstatement of appellant as a civil service employee with compensation for the period of his removal at the rate of pay plaintiff was receiving on the date of discharge. This is the only court that can grant reinstatement and appropriate relief herein.

**E. THE SUIT IS NOT AGAINST THE UNITED STATES.**

Appellees contend that the suit is in effect a suit against the United States which has not consented to be sued.

The authorities cited to support this argument are not in point. The suit is not in effect against the United States. In *Transcontinental & Western Air v. Farley*, 71 F. (2d) 288 (CCA 2, 1934), cited by appellees in the court below, the following rule was enunciated:

“Even though the United States is not joined as a formal party defendant, if its interest is so directly involved that it is the real party in interest and any relief that might be given in such a suit will operate against the sovereign, it is an indispensable party, and the suit cannot be maintained.” (71 F. (2d) 290.)

However, the court, in the following language, stated that there are exceptions to the foregoing rule:

“The case at bar is unlike those in which relief by injunction has been granted against the head of an executive department, or other officer, of the government to enjoin an official act on the ground that it was not within the authority conferred, or that it was an improper exercise of such authority, or that Congress lacked the power

to confer the authority exercised. In those cases the act complained of either involved an invasion or denial of a definite right of the plaintiff [citing cases], or it operated to cast a cloud upon his property [citing cases].” (71 F. (2d) 291.)

The discharge of appellant without fully informing him of the reasons therefor “was not within the authority conferred”.

*Philadelphia Co. v. Stimson*, 223 U.S. 605, 32 S. Ct. 340, 56 L. Ed. 570 (1912), was an action to set aside certain harbor lines so far as they encroached upon the complainant’s land and to restrain the Secretary of War from bringing proceedings against the complainant for the reclamation and occupation of the land outside of the prescribed limits. A demurrer to the bill was sustained and the Court of Appeals of the District of Columbia affirmed this ruling. The Supreme Court also affirmed *on the merits*. There was, however, a jurisdictional question raised in that it was contended that since this proceeding was virtually a suit against the United States, it could not be brought without the consent of the United States. With respect to this contention, the court said:

“If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. *Little v. Barreme*, 2 Cranch. 170, 2 L.ed. 243;



United States v. Lee, 106 U.S. 196, 220, 221, 27 L.ed. 171, 181, 182, 1 Sup. Ct. Rep. 240; Belknap v. Schild, 161 U.S. 10, 18, 40 L.ed. 599, 601, 16 Sup. Ct. Rep. 443; Tindal v. Wesley, 167 U.S. 204, 42 L.ed. 137, 17 Sup. Ct. Rep. 770; Scranton v. Wheeler, 179 U.S. 141, 152, 45 L.ed. 126, 133, 21 Sup. Ct. Rep. 48. And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. *Osborn v. Bank of United States*, 9 Wheat. 738, 843, 868, 6 L.ed. 204, 229, 235; *Davis v. Gray*, 16 Wall. 203, 21 L.ed. 447; *Pennoyer v. McConaughy*, 140 U.S. 1, 10, 35 L.ed. 363, 365, 11 Sup. Ct. Rep. 699; *Scott v. Donald*, 165 U.S. 107, 112, 41 L.ed. 648, 653, 17 Sup. Ct. Rep. 262; *Smyth v. Ames*, 169 U.S. 466, 42 L.ed. 819, 18 Sup. Ct. Rep. 418; *Ex parte Young*, 209 U.S. 123, 159, 160, 52 L.ed. 714, 728, 729, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, 14 A. & E. Ann. Cas. 764; *Ludwig v. Western U. Teleg. Co.*, 216 U.S. 146, 54 L.ed. 432, 30 Sup. Ct. Rep. 280; *Herndon v. Chicago, R. I. & P. R. Co.*, 218 U.S. 135, 155, 54 L.ed. 970, 976, 30 Sup. Ct. Rep. 633; *Hopkins v. Clemson Agri. College*, 221 U.S. 636, 643-654, 55 L.ed. 890, 894, 895, 35 L.R.A. (N.S.) 243, 31 Sup. Ct. Rep. 654. And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred. *Noble v. Union River Logging R. Co.*, 147 U.S. 165, 171, 172, 37 L.ed. 123, 125, 126, 13 Sup. Ct. Rep. 271; *American School v. McAnnulty*, 187 U.S. 94, 47 L.ed. 90, 23 Sup. Ct. Rep. 33.

“The complainant did not ask the court to interfere with the official discretion of the Secretary

of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States.” (32 S. Ct. 344.)

*Ickes v. Fox*, 300 U. S. 82, 57 S. Ct. 412, 81 L. Ed. 525 (1937), was an action seeking a decree requiring the Secretary of the Interior to vacate certain orders limiting the water rights of the owners of certain lands within a federal reclamation project. Motions to dismiss the suit on the ground that the United States was an indispensable party and could not be sued without its consent were denied by the trial court and both the Circuit Court and the Supreme Court affirmed.

With respect to the argument that since the suit was one against the Secretary of the Interior, it was one against the United States, the court said:

“We are thus brought to the decisive question—is the United States an indispensable party defendant? If so, the suits, however meritorious, must fail, since no rule is better settled than that the United States cannot be sued except when Congress has so provided; and here that has not been done. Petitioner’s contention that the United States is an indispensable party defendant and, as it cannot be sued, the suits should have been dismissed, is based upon the propositions, as we understand them, that the United States is the owner of the water-rights; that respondents’ claims rest entirely upon executory contracts; and that the relief sought is the substantial equivalent of specific performance of these contracts.

“The fallacy of the contention is apparent, because the thus-far undenied allegations of the bill, as already appears, demonstrate that respondents have fully discharged all their contractual obligations; that their water-rights have become vested; and that ownership is in them and not in the United States. *The motion to dismiss concedes the truth of these allegations; but even if they were denied we should still be obliged to indulge the presumption, in favor of the jurisdiction of the trial court, that respondents might be able to prove them.* United States v. Lee, 106 U.S. 196, 218, 219, 1 S. Ct. 240, 27 L.ed. 171; cf. Tindal v. Wesley, 167 U.S. 204, 213 et seq., 17 S. Ct. 770, 42 L.ed. 137. In support of his contention, petitioner relies upon American Falls Res. Dist. No. 2 v. Crandall (C.C.A.), 82 F.(2d) 973; but that decision, in so far as it is not in harmony with the view which we have just taken, must be disapproved.

“The suits do not seek specific performance of any contract. They are brought to enjoin the Secretary of the Interior from enforcing an order, the wrongful effect of which will be to deprive respondents of vested property rights not only acquired under Congressional acts, state laws and governmental contracts, but settled and determined by his predecessors in office. That such suits may be maintained without the presence of the United States has been established by many decisions of this court, of which the following are examples: Noble v. Union River Logging R. Co., 147 U.S. 165, 171, 172, 176, 13 S. Ct. 271, 37 L.ed. 123; Philadelphia Co. v. Stimson, 223 U.S. 605, 619, 32 S. Ct. 340, 344, 56 L.ed. 570; Goltra v. Weeks, 271 U.S. 536, 544, 46 S. Ct. 613, 615, 616,

70 L.ed. 1074; *Work v. Louisiana*, 269 U.S. 250, 254, 46 S. Ct. 92, 94, 70 L.ed. 259; *Payne v. Central Pac. Ry. Co.*, 255 U.S. 228, 238, 41 S.Ct. 314, 65 L.ed. 598. These decisions cite other cases to the same effect. The recognized rule is made clear by what is said in the *Stimson Case*:

“ ‘If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded \* \* \* And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process \* \* \*

“ ‘The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States.’

“ ‘The decree of the court below is affirmed.’ (57 S. Ct. 417-8.) (*Italics supplied.*)

All of the foregoing cases, we respectfully submit, indicate that the various grounds advanced in appellees' motion to dismiss are not well taken and that the district court has jurisdiction over the subject matter of the action as well as over the person of the appellee Klein, and that it can and may grant the relief prayed for.

**CONCLUSION.**

For the foregoing reasons we urge this court to reverse the order of the district court dismissing the within action for lack of jurisdiction and we further urge this court to remand the case to the district court with instructions to that court to proceed with the trial of this action on the merits.

Dated, San Francisco,  
July 31, 1947.

Respectfully submitted,  
GLADSTEIN, ANDERSEN, RESNER & SAWYER,  
HERBERT RESNER,  
NORMAN LEONARD,  
*Counsel for Appellant.*



**No. 11,772**

IN THE

**United States Circuit Court of Appeals  
For the Ninth Circuit**

JOHN BRAITO,

*Appellant,*

VS.

GROVER C. KLEIN, Rear Admiral, United  
States Navy, Commandant Mare Island  
Navy Yard, JAMES V. FORRESTAL, Secre-  
tary of the Navy,

*Appellees.*

**APPELLANT'S OPENING BRIEF.**

GLADSTEIN, ANDERSEN, RESNER & SAWYER,  
NORMAN LEONARD,

240 Montgomery Street, San Francisco 4, California,

*Attorneys for Appellant.*

FILED

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No. 11,772

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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JOHN BRAITO,

*Appellant,*

vs.

GROVER C. KLEIN, Rear Admiral, United  
States Navy, Commandant Mare Island  
Navy Yard, JAMES V. FORRESTAL, Secre-  
tary of the Navy,

*Appellees.*

## APPELLANT'S OPENING BRIEF.

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### PRELIMINARY STATEMENT.

This case is a companion case to one already pending before this Court: *Daggs v. Klein, Etc., et al.*, No. 11581. In these cases, as well as in at least one other case now pending in the District Court for the Northern District of California, Southern Division (*Newton v. Klein, Etc., et al.*, No. 25929-R), the facts are substantially the same. Each case involves the discharge of a federal civil service employee presumably pursuant to the provisions of Public Law 671, 76th Congress (50 U.S.C.A. App. 1156), hereinafter quoted, and the claim by the discharged employee that the federal officer charged with the statutory duty of

“fully” informing him of the reasons for his discharge failed so to do thereby depriving said employee of his constitutional and statutory rights to his damage in excess of \$3000.

In the cases now before this Court, two different District Court judges granted motions to dismiss. However, the dismissals were placed upon differing grounds: Judge St. Sure in the *Daggs* case holding that no federal question had been presented, and Judge Goodman in this case holding that the Secretary of the Navy was an indispensable party and the suit had to be dismissed for lack of jurisdiction over that officer.

The appellees urged a variety of grounds in support of their motions to dismiss in each of the two cases below, including those relied upon by each of the two District Court judges. We think it is significant that the two judges themselves were not able to agree on the precise ground for the granting of the motions. This indicates at least that there is some lack of clarity in the thinking on the problems posed by these cases and that a careful review of the District Court rulings is in order.

Since we have already filed an opening brief in the *Daggs* case, we believe it is not necessary to repeat all of the arguments therein contained, and with this Court's permission we should like to incorporate herein by reference so much of that brief as is germane to the instant appeal. Since Judge Goodman decided the instant case upon the ground that the Secretary of the Navy was an indispensable party,

we shall in this brief direct our principal attention to the problem posed by that ruling.

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### **JURISDICTION.**

The jurisdiction of the District Court to entertain this action is conferred by Section 24, amended, of the Judicial Code. (28 U.S.C. 41.) The jurisdiction of the Circuit Court of Appeals to review the District Court's final order dismissing the action for lack of jurisdiction over the Secretary of Navy, an alleged indispensable party, is conferred by Section 128, amended, of the Judicial Code. (28 U.S.C. 225.)

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### **STATUTES INVOLVED.**

Section 6 of Title 1 of Chapter 440 of the Act of June 28, 1940 (54 Stat. 679) as amended on August 21, 1941, by Chapter 385 (55 Stat. 654), so far as is relevant to this proceeding, provides:

“That during the national emergency declared by the President on September 8, 1939, to exist, the provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555; 5 U.S.C. § 652), shall not apply to any civil-service employee of the War or Navy Departments or of the Coast Guard, or their field services, whose immediate removal is, in the opinion of the Secretary concerned warranted by the demands of national security, but nothing herein shall be construed to repeal, modify, or suspend the proviso in that section. Those persons summarily removed under the

authority of this section may, if in the opinion of the Secretary concerned, subsequent investigation so warrants, be reinstated, and if so reinstated, shall be allowed compensation for the period of such removal at the rate they were receiving on the date of removal: And provided further, That within thirty days after such removal any such person shall have an opportunity personally to appear before the official designated by the Secretary concerned and be fully informed of the reasons for such removal, and to submit, within thirty days thereafter, such statement or affidavits, or both, as he may desire to show why he should be retained and not removed." (50 U.S.C. App. 1156.)

Section 6 of the Act referred to in the foregoing excerpt reads in part as follows:

"No person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; \* \* \*" (5 U.S.C. 652.)

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#### QUESTIONS PRESENTED.

1. Whether the Court below erred in granting appellees' motion to dismiss.
2. Whether the Court below erred in entering its order dismissing the action.

3. Whether the Court below erred in determining that the Secretary of the Navy is an indispensable party to this action.

4. Whether the Court below erred in determining that the first amended complaint does not state a cause of extra-official action without legislative sanction.

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### THE PLEADINGS.

The action was instituted by the filing of a complaint on May 6, 1946. (T.R. 2-13.)<sup>1</sup> Thereafter, and before any pleadings were filed by appellees, appellant filed a first amended complaint on January 30, 1947. (T.R. 13-24.) The gravamen of the complaint is that appellant, a Federal Civil Service employee at the Mare Island Navy Yard, was discharged from his employment there by the appellees and their predecessors in office, officers of the United States government, in violation of his rights under the Constitution of the United States and of his rights under the provisions of the above-quoted Act of Congress of June 28, 1940; the violation is alleged to have occurred in that within thirty days after his removal, appellant was not "fully informed of the reasons for such removal,"<sup>2</sup> and consequently not given an oppor-

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<sup>1</sup>References to the Transcript of Record will be cited herein as T.R.

<sup>2</sup>The complaint set forth the *verbal* statement given to appellant in connection with his discharge:

"Since September, 1939, the United States of America has been under a condition of emergency which has now been declared by the President to be unlimited. Under this condition, in spite of the very liberal governmental labor policy

tunity to submit "such statement or affidavits, or both, as he (might) desire to show why he should be retained and not removed." The amended complaint contains substantially the same allegations but points up a little more sharply the constitutional provisions which appellant alleges were violated.<sup>3</sup>

On June 23, 1947, the appellees filed their motion to dismiss the action upon the grounds that the Court

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in the employment of its citizens, it has been incumbent upon all of its employees so to conduct themselves that there should be not the least concern on the part of their associates or their administrative officials as to their unquestioned adherence to the principles of the government and their loyalty in furthering its defense against enemies within or without.

"Despite the constitutional rights of individuals as to freedom of speech and political opinion, these rights are not directly concerned in the right to actual employment in a governmental activity. This, each individual must maintain for himself by the correctness of his attitude and his behaviour.

"Mr. Braito, your discharge was warranted by the demands of national security and was made from this Navy Yard because *a confidential investigation disclosed that you do not possess the requisite degree of loyalty to the United States to remain an employee at this Navy Yard since you have been actively associated with members of and attending meetings of an organization which advocates the overthrow of the constitutional form of government of the United States.* You are advised that within thirty days from the date of this interview, Thursday, July 24, 1941, you have the privilege of submitting any statement or affidavit, or both, which you may desire to show why you should be retained and not discharged. These must be submitted in writing." (T.R. 5-6, 16-17.)

Appellant contends that this vague and indefinite statement does not meet the requirement of the statute.

<sup>3</sup>Paragraph XIII of the First Amended Complaint alleged:

"That the action of the defendants in removing the plaintiff from his employment, as aforesaid, was, and is, a violation of the rights guaranteed to the plaintiff by the first and fifth amendments to the Constitution of the United States, in that said action abridged plaintiff's freedom of speech, of the press, and his right, peaceably, to assemble, and in that said action deprived plaintiff of his property without due process of law." (T.R. 22-23.)



lacked jurisdiction over the person of the appellee Forrestal, that the Court lacked jurisdiction over the subject matter of the complaint, that the suit was in effect one against the United States which had not consented to be sued, that the complaint failed to state a cause of action against the defendants on which relief could be granted, and that the suit might not be maintained in the absence of the appellee Forrestal who was asserted in the motion to be an indispensable party. (T.R. 25-26.)

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#### **THE OPINION OF THE DISTRICT COURT.**

On August 5, 1947, the District Court issued its Order Granting Motion To Dismiss (T.R. 27), which reads in full as follows:

“The action of the Secretary of the Navy, through the Commandant of the Mare Island Navy Yard, in discharging plaintiff from his civil-service position was taken pursuant to statutory authority (50 USCA App. Sec. 1156). Plaintiff’s complaint states, at most, an alleged improper exercise of that authority in failing, after dismissal, to fully inform plaintiff of the reasons for his removal. It does not state a case of extra-official action without legislative sanction. Whether plaintiff alleges facts entitling him to reinstatement or to an opportunity to be more fully informed of the reasons for his dismissal, the Secretary of the Navy in whom is vested the statutory power of dismissal and of reinstatement under 50 USCA App. Sec. 1156, is an indispensable party to the action. (Neher v.

Harwood, 128 F. 2d 846, [9th Cir.] Cert. Denied Oct. 12, 1942.)

“Ordered:

“Defendants’ motion to dismiss is granted for lack of jurisdiction over the defendant, James V. Forrestal, Secretary of the Navy, an indispensable party to the action.” (T.R. 27-28.)

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### ARGUMENT.

As appears from the above, the decision of the Court below seems to have been based upon only one of the grounds urged by the appellees in the motion to dismiss. In this argument, we shall consider the authority cited in the opinion of the Court below as the basis for its ruling that the Secretary of the Navy is an indispensable party and endeavor to establish that in this respect the Court below was in error and should be reversed. We shall then refer to the other propositions advanced by appellees in the motion to dismiss and by a reference to our opening brief in *Daggs v. Klein, Etc. et al.*, No. 11581 in this Court, endeavor to establish to the satisfaction of this Court that they are not well taken. We shall thereupon urge upon this Court a reversal of the order of the Court below with a clear expression of its opinion that not only is the Secretary of the Navy not an indispensable party to this action, but that the Court below does have jurisdiction in all respects as that question is raised by the motion to dismiss so that the matter may be remanded to the trial Court with instructions to proceed on the merits.

## I.

**THE SECRETARY OF THE NAVY IS NOT AN INDISPENSABLE  
PARTY TO THE ACTION.**

The entire basis of the reasoning of the Court below, as far as can be ascertained from its order granting the motion to dismiss, is that the Secretary of the Navy is an indispensable party to the action. Applying the rule of this Court in *Naher v. Harwood*, 128 F. (2d) 846, the Court below felt impelled to enter its order of dismissal.

Insofar as *Naher v. Harwood* holds that an action must be dismissed in the absence of service upon or jurisdiction over an indispensable party defendant, we do not quarrel with the rule. Insofar, however, as the case is cited for the proposition that on the facts of the instant case the Secretary of the Navy is an indispensable party, we submit that it has been misconstrued and misapplied. We think that a careful analysis of *Naher v. Harwood* will establish that this is so.

That case, as appears from the very opening sentence of the Court's opinion (128 F. [2d] 846), was an action to enjoin a local post master from carrying into effect a fraud order issued by the Post Master General pursuant to a federal statute. Here we pause to point out that in the case now before the Court there is no effort to enjoin a subordinate officer from carrying into effect any order issued by a superior officer. The very nature of the two causes is markedly different.

In the *Naher* case the appellant (the complainant below) sought by the action to have the fraud order declared void for the reasons that the facts did not show any violation of the statute and that the statute was unconstitutional. In our case there is no effort to have any order of a superior officer declared void, nor is there a complaint that the statute *as written* is unconstitutional. On the contrary, it is our contention that *the subordinate officer failed properly to comply with the terms of the statute and in effect the subordinate officer has himself violated the statute*. By so doing *he (the subordinate officer)* has invaded appellant's constitutional rights. If *he (the subordinate officer)* had conformed with the statutory requirement of "fully informing" appellant of the nature of the charges against him, appellant then would have no complaint with respect to the action of the subordinate officer.

In the *Naher* case this Court made a rather extensive analysis of the problem of indispensable parties and determined that where a superior federal officer has acted under a statute which is not attacked as unconstitutional but where it is alleged *that the superior officer* has abused his discretion, *such an officer* must be made a party to an action against a subordinate; but that, on the other hand, where the superior officer is without authority to act at all, his attempt to authorize action by a subordinate is of no validity and the subordinate may be restrained without joining the superior officer.

With this rule we can have no quarrel. However, *the facts of the instant case do not fit into the rule.* It will be noted that the Court required the joinder of the superior officer in the *Naher* case when two conditions existed:

1. The statute is not attacked as unconstitutional; and

2. The superior officer has abused his discretion.

In our case the first condition is (or may under some circumstances be) met, but the second condition is not involved at all. It is not contended by appellant that the Secretary of the Navy abused his discretion in ordering the discharge of appellant, for in that respect he was acting within the scope of his statutory authority. However, it is contended that *the subordinate officer*, to-wit, Admiral Friedell, predecessor of the appellee Klein, *abused his discretion* by failing fully to inform appellant of the nature of the charges against him.

In other words, what the statute involved in this case does is to split the responsibility between the superior and the subordinate officer. The superior officer has the authority to discharge and to reinstate. However, since the employee is given the right to submit in written form reasons to justify his reinstatement or retention, and since he is given an opportunity personally to appear before "the official designated by the secretary concerned and be fully informed of the reasons for such removal," so that he may file the necessary documents which will meet those charges, the responsibility is placed upon "the official designated

by the secretary concerned” to make the full disclosure required by the statute. *It is not placed upon the secretary.* If the subordinate officer abuses his discretion and fails to comply with the statute, then that officer (the *subordinate*, not the Secretary) has deprived the employee of information which Congress said that that officer was to give to the employee in order to permit the employee to submit within thirty days statements or affidavits to show why he should be retained and not removed. In such a case the employee’s complaint must of necessity be directed against the subordinate and the relief requested must run against the subordinate. At this stage of the statutory proceedings, nothing is required to be done by the Secretary, the entire responsibility for “fully informing” the employee is placed by the statute upon the subordinate officer.

An analysis of the statutes involved in the cases cited by this Court in support of its conclusion in the *Naher* case will show the correctness of this view. In each of those cases the *statute* required that the act around which the litigation centered be done by the *superior* officer himself, not by any subordinate officer. Thus, while in *Warner Valley Stock Co. v. Smith*, 165 U. S. 28, the Supreme Court recognized that the purpose of the action was to “control the action of the Secretary of the Interior” and that “the principal relief sought was against him, and the relief asked the Commissioner of the General Land Office was only incidental, and by way of restraining him from executing the order of his official head”, yet basic to the

Court's conclusion was the fact that the statute involved provided that it should be the duty of the *Secretary of the Interior* to make out certain lists and plats of land and to cause a patent to be issued to the states in which they were situated under certain conditions. His subordinates were merely carrying out departmental instructions in connection with the designations made by *the Secretary of the Interior himself*.

In the case now before the Court, the statute is clear that "the official designated by the Secretary concerned" shall take certain action, not the secretary himself. It is the action or the lack of action of the official so designated and not of the secretary which gives rise to the complaint herein.

So in *Gnerich v. Rutter*, 265 U. S. 388, an action was brought against a local prohibition director to enjoin him from giving effect to a restriction contained in plaintiff's permit to sell intoxicating liquor. The permit had been issued by a subordinate officer pursuant to certain general regulations promulgated by the Commissioner of Internal Revenue. In holding that the Commissioner was an indispensable party, the Court pointed out that *the statute specifically provided that the Commissioner* should have authority to issue permits and to prescribe the form thereof.

Similarly, in *Webster v. Fall*, 266 U. S. 507, *the statute involved required the Secretary of the Interior* to cause funds to be paid to members of certain Indian tribes. The failure to join the Secretary was

held by the Court to be fatal. In addition to the statutory mandate which placed the responsibility for the action directly upon the shoulders of the Secretary of the Interior, the pleadings in that case, as summarized by the Court, indicate that the plaintiff himself recognized that the Secretary was the party against whom he should complain for he apparently alleged that the orders, rules and regulations issued under the statute by the *Secretary of the Interior* were unconstitutional.

It is seen from these cases and from the reasoning of this Court in the *Naher* case that the superior officer is an indispensable party *when he is the officer charged by Congress with the commission of certain acts*. However, the statute in the case now before the Court clearly does not charge the Secretary of the Navy with the responsibility for fully informing discharged employees of the reason for their discharge, but rather places that responsibility upon an official to be designated by the Secretary of the Navy. The Secretary of the Navy's statutory duty in this respect terminates when he so designates the official. Then the responsibility is squarely upon the shoulders of the official so designated. The failure of that official to comply with the statutory mandate gives rise to a cause of action against him, and the Secretary of the Navy can hardly be regarded as an indispensable party in such a cause of action.

In support of the statutory construction we here urge, we should like to direct the Court's attention to one other consideration. The rule that a cabinet officer is an indispensable party to a proceeding by a



citizen for redress is of course a fairly harsh one. It, coupled with the rule that the official residence of cabinet officers is in the nation's capital and that jurisdiction over them can only be obtained in Courts at that place, makes it necessary for a citizen aggrieved by federal action to travel to the nation's capital and institute his suit there. Certainly such a harsh rule should only be applied wherever it is absolutely required. It is not consistent with our concepts of governmental responsibility to private citizens to permit the defeat of such claims upon the technical grounds of failure to obtain jurisdiction over cabinet officers.

We have indicated above, of course, that as we see it the statute now before the Court for consideration does not make the Secretary of the Navy an indispensable party. We simply urge this additional argument as one which would justify the statutory construction urged by us in the event that the Court should entertain any doubt about the proper meaning of the statutory language.

In this connection we should like to repeat what we said in our brief in the *Daggs* case concerning the matter of jurisdiction over the Secretary of the Navy. The facts as set forth in these complaints disclose a shocking and outrageous disregard of the rights of American citizens and a violation by the Commandant of the Navy Yard and predecessor of defendant Klein of the Act of June 28, 1940, expressly providing that civil service employees discharged pursuant to the provisions of that statute should be *fully informed* of

the reasons for the discharge. Appellant here, a federal employee with more than nineteen years permanent civil service status and belonging only to fraternal organizations and a trade union (T.R. 8, 19-20), was summarily discharged from the Navy Yard thereby losing all of his civil service rights including his right to accrued leave and pay. The only reason given appellant for his removal was a vague and indefinite statement (T.R. 5, 16-17) by the officer designated by the Secretary of the Navy to give him the full information required by the statute. No effort was made to serve complaint and summons upon the Secretary of the Navy as appellant was aware that that officer could not be sued in this district without his consent. In naming Secretary Forrestal as a defendant, appellant did so for the purpose of giving that officer an opportunity to appear before the Court and to attempt to defend the failure of his subordinate officer to comply with the provisions of the statute. The position taken by the United States Attorney on behalf of the Secretary of the Navy indicates that the Secretary of the Navy, at least, does not care to undertake such a defense.

In any event, as we have pointed out above, the Secretary not being an indispensable party, the suit may be dismissed as to him and a cause of action still remains against the subordinate federal officer.

## II.

THE DISTRICT COURT HAD JURISDICTION  
OF THE ACTION.

In addition to the point made by the District Court that the suit had to be dismissed because there was no jurisdiction over the Secretary of the Navy, the government raised certain other points in its motion to dismiss. We urge upon this Court a reversal of the District Court not only on the precise point upon which its decision was rendered, but also an expression of this Court with respect to its views upon the other matters raised in the government's preliminary motion so that when the cause is remanded to the District Court it may proceed to trial on the merits. These points we have heretofore discussed in our brief in the *Daggs* case and at this point we will simply state our position and refer to the argument in our opening brief in the *Daggs* case.

A. There is no interference sought with the discretion of an executive officer for the statute permits of no discretion. (See Appellant's Opening Brief, *Daggs v. Klein, etc., et al.*, No. 11,581, pages 51-56.)

B. The amount claimed is not beyond the jurisdiction of the District Court. (*Ibid.*, pages 56-57.)

C. The suit is not against the United States. (*Ibid.*, pages 57-63.)

D. There is a federal question presented. (*Ibid.*, pages 6-46.)

**CONCLUSION.**

For the foregoing reasons we urge this Court to reverse the order of the District Court dismissing the within action for lack of jurisdiction over the Secretary of the Navy since it is clear that the Secretary of the Navy is not an indispensable party to the proceeding. We further urge this Court to remand the case to the District Court with instructions to that Court to proceed with the trial of the action on the merits so that the violation of appellant's statutory and constitutional rights may be corrected as speedily as possible.

Dated, San Francisco, California,  
January 2, 1948.

GLADSTEIN, ANDERSEN, RESNER & SAWYER,  
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*Attorneys for Appellant.*

Nos. 11,581 and 11,772

IN THE  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

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JAMES A. DAGGS,

*Appellant,*

vs.

GROVER C. KLEIN, Rear Admiral,  
United States Navy, Commandant,  
Mare Island Navy Yard and JAMES  
V. FORRESTAL, Secretary of the  
Navy,

*Appellees.*

No. 11,581

JOHN BRAITO,

*Appellant,*

vs.

GROVER C. KLEIN, Rear Admiral,  
United States Navy, Commandant,  
Mare Island Navy Yard and JAMES  
V. FORRESTAL, Secretary of the  
Navy,

*Appellees.*

No. 11,772

Upon Appeal from the District Court of the United States for the  
Northern District of California, Southern Division.

**BRIEF FOR APPELLEE.**

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IN THE

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GROVER C. KLEIN, Rear Admiral,  
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Navy,

*Appellees.*

No. 11,772

Upon Appeal from the District Court of the United States for the  
Northern District of California, Southern Division.

**BRIEF FOR APPELLEE.**

### PRELIMINARY STATEMENT.

These cases are before the Court for consideration together because of the fact that they involve in substance the same facts and this Court on September 25, 1947, ordered that appellee might file one brief in both cases and that they be consolidated for hearing.

In the *Daggs* case, No. 11,581, the District Court dismissed the case "*sua sponte*" as not within its jurisdiction.

Following the decision the complaint in the *Braitto* case, No. 11,772, was amended by adding a paragraph.<sup>1</sup> The District Court in that case granted a motion to dismiss, holding that the Secretary of the Navy was an indispensable party.

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### OPINIONS BELOW.

The opinions of the District Court in each case are set out in full in the transcript of record.

No. 11,581 (T. R. pp. 13-18); No. 11,772 (T. R. pp. 27-28).

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### <sup>1</sup>"XIII.

That the action of the defendants in removing the plaintiff from his employment, as aforesaid, was, and is, a violation of the rights guaranteed to the plaintiff by the first and fifth amendments to the Constitution of the United States, in that said action abridged plaintiff's freedom of speech, of the press, and his right, peaceably, to assemble, and in that said action deprived plaintiff of his property without due process of law."

### **JURISDICTION.**

The jurisdiction exercised by the Courts below was by virtue of the provisions of 28 U.S.C. 41.

The jurisdiction of this Court to review the orders of the District Court is conferred by 28 U.S.C. 225.

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### **STATUTES INVOLVED.**

The statutes involved, 50 U.S.C. App. 1156 and 5 U.S.C. 652, are set out in full in appellants' briefs.

(Daggs Brief, pp. 2-3; Braito Brief, pp. 3-4.)

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### **FACTS.**

The facts before this Court appear from the pleadings and the rulings and opinions of the Courts below. The facts as disclosed by the pleadings are summarized correctly in appellants' briefs.

(Daggs Brief, pp. 3-4; Braito Brief, pp. 5-6.)

Such facts are the same in each case, notwithstanding the amendment to the complaint in the *Braito* case<sup>1</sup>, supra. There was already in the *Daggs* case, and in the original Braito complaint, an allegation that the controversy was one arising under the Constitution and Laws of the United States. The argumentative statement of the pleaders' legal conclusions relative to description of such controversy adds nothing.

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### QUESTIONS PRESENTED.

Since the cases are being heard by the Court as one, and the facts are the same, it seems clear that the order dismissing the cases may be affirmed by this Court on the grounds stated by the District Courts in either case, or on any other ground sufficient to justify such rulings.

This is, in effect, the position taken by appellants.

(Daggs Brief, p. 6; Braito Brief, p. 8.)

There is then one and only one question and that is the same in both cases:

Did the Courts below err in dismissing plaintiffs' complaints?

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### ARGUMENT.

For the purpose of the Court's convenience we shall arrange our argument to conform to the arrangement of argument in appellants' briefs.

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#### I.

Answering appellant's brief. (Daggs Brief, pp. 6-46.)

#### THERE IS NO JUSTICIABLE FEDERAL QUESTION PRESENTED.

Until the decision of the Supreme Court in *Bell v. Hood*, 327 U. S. 678, it had been assumed that no such action was within the jurisdiction of the District Court unless the Constitution or a law of the United

States afforded a remedy for the asserted wrong; the dissenting opinion in the *Bell* case makes this clear. (p. 685-686.) It is also clear that the case here stated is, even under that decision, not a justiciable controversy. It is not an action for damages and Admiral Friedell, whose alleged wrongful act is complained of, is not a party.

## II.

Answering appellants' briefs (Daggs, pp. 46-62; Braito, p. 17.)

Assuming that there is a cause of action cognizable in some Federal Court:

### THE DISTRICT COURT DID NOT HAVE JURISDICTION OF SUCH ACTION.

A. The District Court had no jurisdiction over the Secretary of the Navy.

It is admitted that he was not served; that he did not submit himself to the Court's jurisdiction, and that without his consent no Court other than that of the District of Columbia where he resides may acquire jurisdiction over him.

5 *U.S.C.* 411, Residence of Secretary of Navy;  
*Ferris v. Wilbur*, 27 Fed. 262-263.

B. Answering (B) Appellants' Brief. (Daggs pp. 49-56; Braito pp. 9-16.)

### THE SECRETARY OF THE NAVY IS AN INDISPENSABLE PARTY.

The purpose of the action is clear from the relief sought, reinstatement, compensation during the period

of removal at former pay, and restoration of accrued leave.<sup>2</sup>

The terms of the statute under which the plaintiffs were discharged make both discharge and reinstatement dependent on "the opinion of the Secretary concerned."

The complaints in each case state, in effect, that the discharge complained of was with the approval of the Secretary.

In such a case it is evident that the action sought to be directed is that of the Secretary.

We do not contend that no Court may "mandamus" the Secretary of the Navy; merely that neither of the Courts below had jurisdiction so to do.

The cases cited by plaintiff (pp. 53-56, Daggs Brief) are cases where jurisdiction over the Secretaries concerned existed, or where the cases were expressly against the United States. What we had in mind is clear from the pleadings.

The defendant over whom the District Court had personal jurisdiction, Admiral Klein, cannot grant

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<sup>2</sup>"Wherefore, plaintiff prays judgment:

"1. That defendants be ordered forthwith to reinstate plaintiff as a civil service employee at the Mare Island Yard in the same capacity in which plaintiff was working at the time of his discharge.

"2. That defendants be ordered to compensate plaintiff for the period of his removal at the rate of pay plaintiff was receiving on the date of his discharge.

"3. That defendants be ordered to reinstate the right of plaintiff to accrued leave with pay as the same existed on the date of discharge."

(Tr. of R. 11,772—pp. 23-24.)

(Tr. of R. 11,581—pp. 9-10.)

the relief sought, as that is an exclusive function of the Secretary.

Whether any action of any nature can lie against Admiral Klein founded upon his predecessor's alleged wrongful acts is questionable.<sup>3</sup>

The principles of law involved have been recently stated in *Williams v. Fanning*, 332 U. S. 490, in such a manner as to settle beyond any doubt the question here presented. The Court through Mr. Justice Douglas, stated, referring to the line of such cases holding superior officers to be indispensable parties:

“These cases evolved the principle that the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him.”

(P. 493.)

Referring to the line of cases holding the opposite view, he stated:

“In those situations relief against the offending officer could be granted without risk that the judgment awarded would ‘expend itself on the

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<sup>3</sup>It is not alleged that there is any privity between Admiral Klein, who is the sole remaining defendant, and his predecessor Admiral Friedell.

Cf. *Ex parte La Prade*, 289 U.S. 444;

Chief Justice Taft's statement in *Gorham Mfg. Co. v. Wendell*, 261 U.S. 1-4:

“\* \* \* the inherent difficulty in these (substitution cases) is not the liability and suability of the successor in a new suit. It is in the shifting from the personal liability of the first officer for threatened wrong or abuse of his office to the personal liability of his successor when there is no privity between them.”

public treasury or domain, or interfere with the public administration'. (*Land v. Dollar*, 330 U. S. 731, 738.)”  
(P. 493.)

He announced the test to be “\* \* \* if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the Court.”

Here it is clear that the relief sought would require the Secretary to reinstate plaintiffs as that power is by statute exclusive in him; it is equally clear that the judgment sought, if awarded “would expend itself on the public treasury \* \* \*, or interfere with public administration.”

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**C. THE ACTION SEEKS TO CONTROL THE EXERCISE OF A DISCRETIONARY EXECUTIVE FUNCTION.**

That the function of discharging, or of reinstating discharged employees is, under the statute in question, within the discretion of the Secretary and exclusive in him, is clear from the language of the statute. Both functions are exercisable when in his “opinion” their exercise is warranted. The suits without the Secretary as a party seek to force him to exercise this executive discretion through a subordinate.

*Warner Valley Stock Co. v. Smith*, 165 U. S. 28-33-35;

*Webster v. Fall*, 266 U. S. 507;

*Adams v. Nagle*, 303 U. S. 532-540-542.



The discretionary executive function so sought to be controlled is one which under normal conditions Courts have declined to attempt to control, particularly in cases where, as here, to grant the relief sought would be an idle act.

*U. S. ex rel. Greathouse v. Dern*, 289 U. S. 352-360.

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**D. THE AMOUNT CLAIMED IS BEYOND THE JURISDICTION OF THE DISTRICT COURT.**

That the actions are in effect against the United States seems obvious from what has already been stated under A, B and C, *supra*.

It is evident that the money judgment sought (back pay for the periods concerned) "would expend itself on the public treasury." It is equally evident that the amount so sought to be collected would exceed the jurisdiction of the District Court.

Considering the case as one against the United States over which some Federal Court has jurisdiction it is apparent that such jurisdiction is exclusive in the Court of Claims.

28 *U. S. C.* 41, subdiv. 20.

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**E. THE SUITS ARE AGAINST THE UNITED STATES.**

This point has been involved in practically all the foregoing discussion, and is in our opinion the real basis for the requirement that the superior officer be

joined in all cases where the judgment sought may affect the public treasury or interfere with public administration. In such cases a governmental interest is involved.

Here the District Court, not having jurisdiction over the person of the Secretary, lacks jurisdiction to make any decision concerning the governmental function which he exercises, just as, absent personal jurisdiction, no judgment may be rendered against him.

Under the circumstances of these cases where the function of *discharging* exercised, and that of *re-instating* sought to be directed, are exclusive in the Secretary and by plain language of the statute discretionary, there can be no question but that the requested relief affects the public administration. In such case the suit is against the United States which, if it has consented to be sued in such a case (mandamus) has designated another forum.

The Government's interest is to be determined from "the essential nature and effect of the proceeding as it appears from the entire record."

*Ex parte New York*, 256 U. S. 490-500.

The effect of these proceedings would clearly be to burden the Treasury of the United States by award of back pay during the period of removal and to interfere with the public administration of the law. In such a case it seems clear that these cases fall within the rule stated in *Transcontinental & Western Air v. Farley*, 71 F. (2d) 288-290, rather than the exception

to that rule relied on by appellant. (App. Brief Daggs, pp. 57-62.)

*Mine Safety Appl. Co. v. Forrestal*, 326 U. S.  
371-374.

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### CONCLUSION.

In these cases there was no defendant other than Admiral Klein before the District Court. It is clear that he may not be held responsible for the acts of his predecessor.

Any relief granted, if of any effect, must impinge on the government; back pay—on the Treasury; reinstatement—on the public administration.

The District Court was in each case requested to do an idle act in the exercise of a non-existent jurisdiction. The dismissals were each proper on the grounds stated by the District Courts and the judgments and orders of dismissal should be affirmed.

Dated, San Francisco,  
May 3, 1948.

Respectfully submitted,

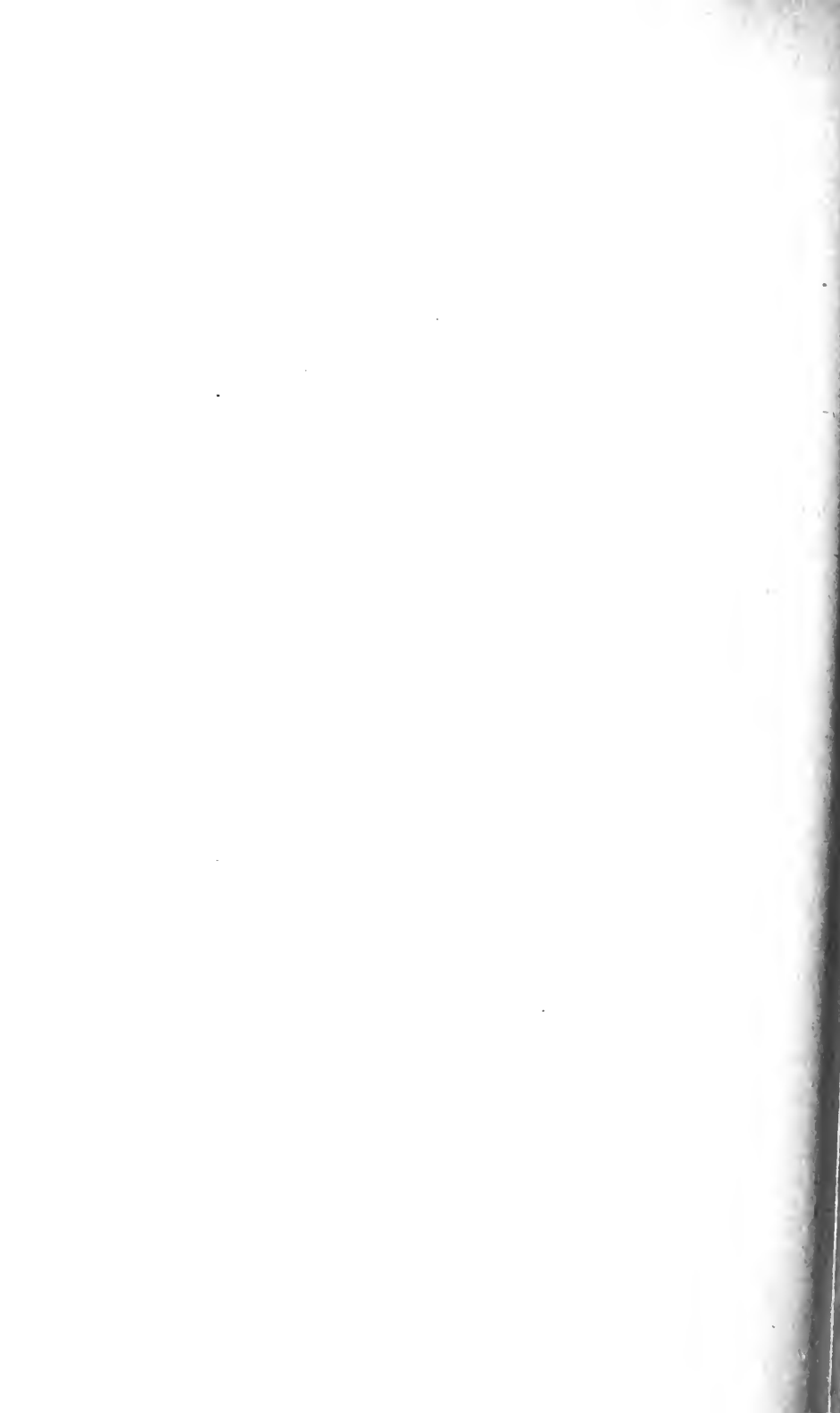
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Nos. 11,581 and 11,772

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES A. DAGGS,

*Appellant,*

vs.

GROVER C. KLEIN, Rear Admiral,  
United States Navy, Commandant,  
Mare Island Navy Yard and JAMES  
V. FORRESTAL, Secretary of the  
Navy,

*Appellees.*

No. 11,581

JOHN BRAITO,

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United States Navy, Commandant,  
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V. FORRESTAL, Secretary of the  
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*Appellees.*

No. 11,772

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MAY 27 1948

PAUL P. O'BRIEN,

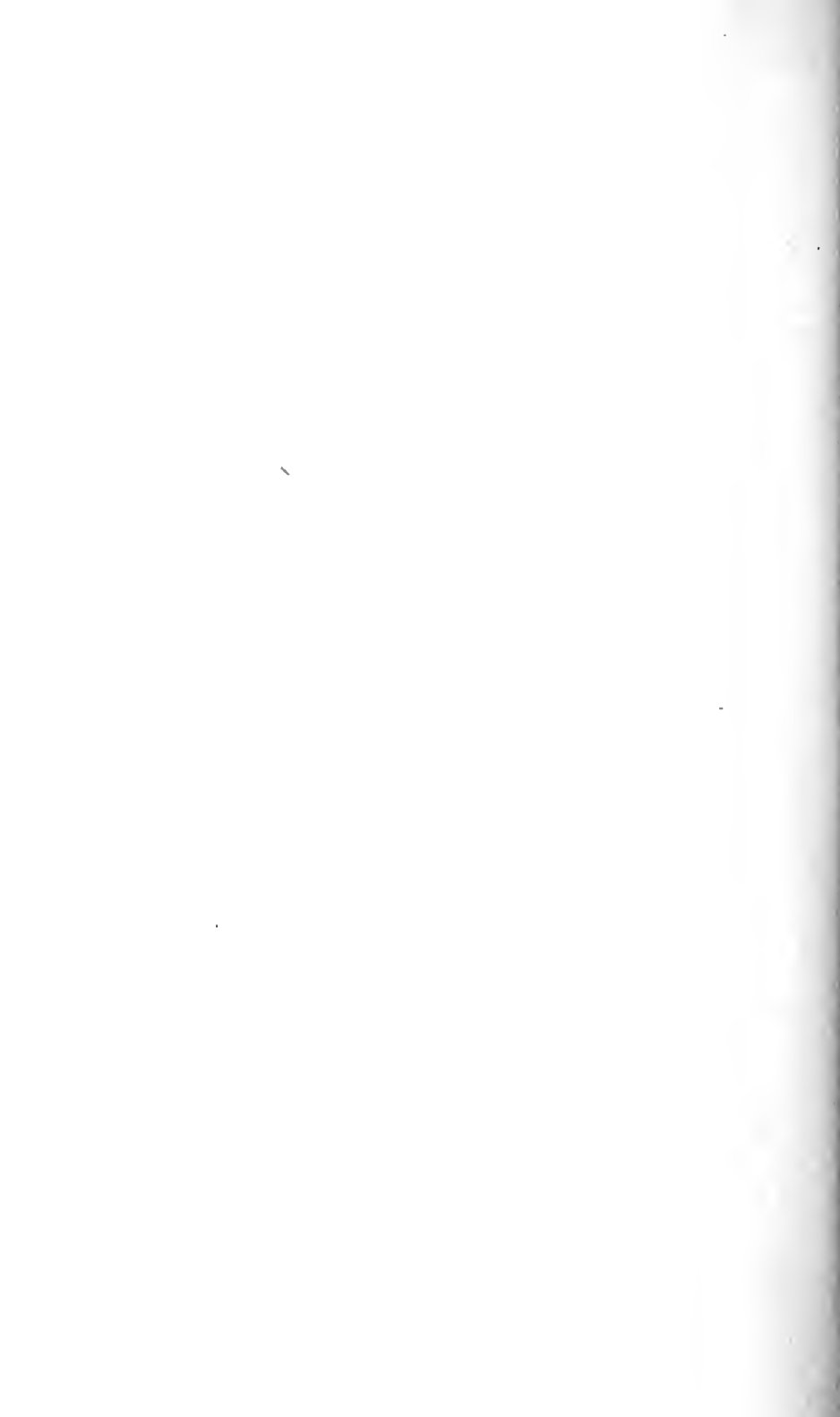
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APPELLANTS' REPLY BRIEF.

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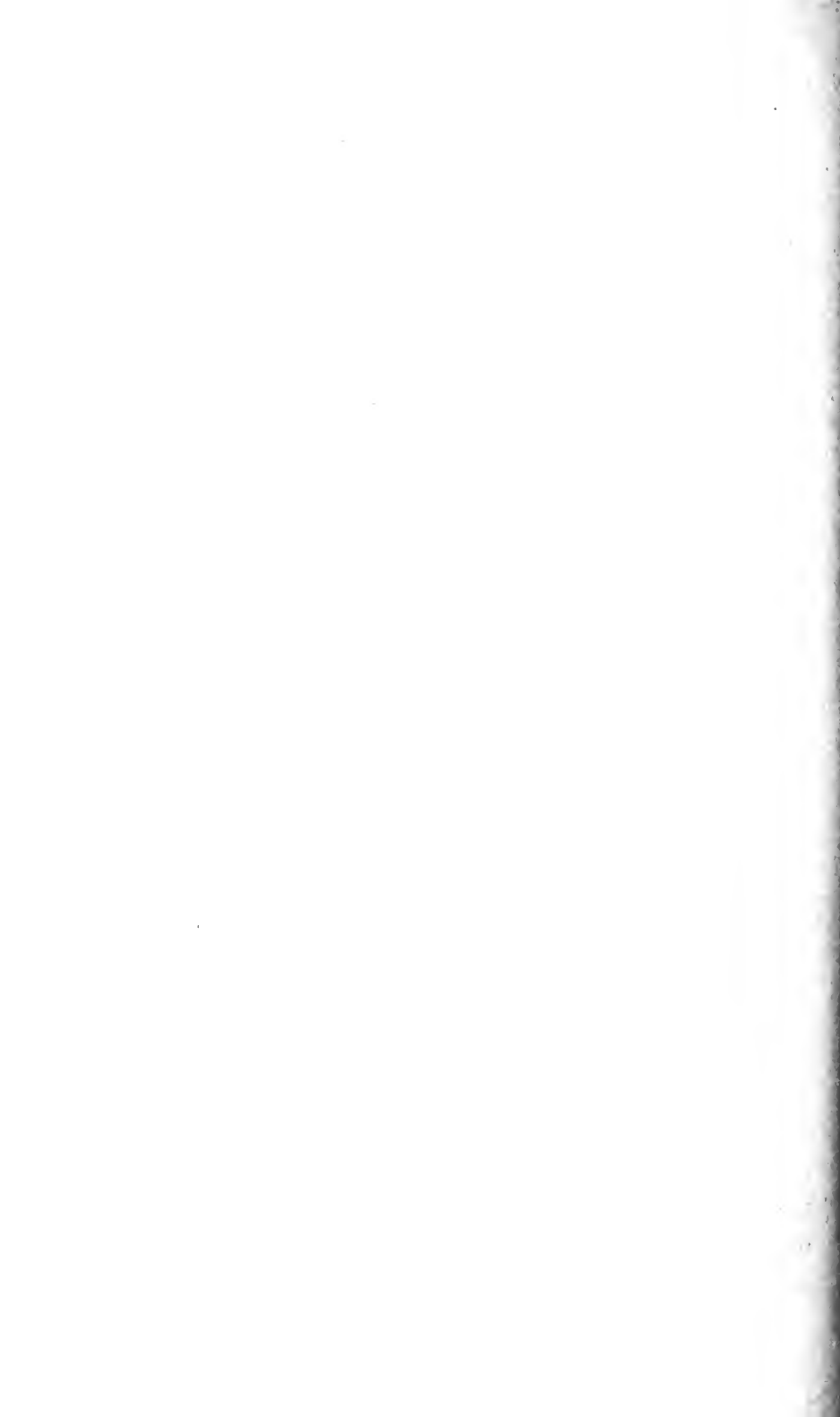
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No. 11,772

## APPELLANTS' REPLY BRIEF.

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In this brief we will consider only such points as are raised in the brief for appellee. We will not re-discuss any points made by us in our opening briefs which the brief for appellee fails to consider.

## I.

## THERE IS A FEDERAL QUESTION HERE.

The first point made by appellee is that there is no justiciable federal question presented here. (Brief for Appellee, pp. 4-5.) In support of this position appellee first cites the dissenting opinion in *Bell v. Hood*, 327 U. S. 678, and then seeks to distinguish the majority opinion in that case. Insofar as reliance is placed upon the dissenting opinion we respectfully submit that this Court is bound to follow the mandate of the majority of the Supreme Court. Insofar as an attempt is made to distinguish *Bell v. Hood*, we respectfully submit that it fails. In our opening brief in the *Daggs* case, we discussed *Bell v. Hood* at some length (pp. 32-39.) This case was originally cited by Judge St. Sure in his memorandum opinion on his order dismissing the complaint in the *Daggs* case as a decision of this Circuit Court in support of the proposition that no federal question was presented. (*Daggs*, Tr. p. 17.) We discussed *Bell v. Hood* at some length for two reasons: (1) because the decision of this Circuit was reversed by the Supreme Court thereby indicating that at least one of the authorities upon which Judge St. Sure relied was no longer valid, and (2) because the facts and opinion in *Bell v. Hood* were so closely analogous to the case at bar. The question involved in both the case at bar and *Bell v. Hood* was whether or not violations of constitutional and statutory rights by federal officials gave rise to a federal justiciable question. The decision in *Bell v. Hood*, which we

respectfully submit is binding upon this Court, was that they did.

## II.

The next point made by the appellee is that the District Court had no jurisdiction over the Secretary of the Navy. This matter has been fully discussed by us in the *Daggs* brief at pages 46 to 48, and in the *Braitto* brief at pages 15 and 16, and since the appellees raise no points which were not considered in those portions of our briefs we will not repeat the argument here.

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## III.

### THE SECRETARY OF THE NAVY IS NOT AN INDISPENSABLE PARTY.

The next point made by the appellee is that the Secretary of the Navy is an indispensable party to the action. Here, too, the appellants' position is stated in some detail in the opening briefs. (*Daggs* brief, pp. 48-51; *Braitto* brief, pp. 9-16.)

The only authority cited in appellee's brief is *Williams v. Fanning*, 332 U. S. 490. Appellee quotes certain language from that opinion but neglects to analyze the case and state precisely what was the holding. Such an analysis and examination would probably be embarrassing to the appellee's position because if *Williams v. Fanning* stands for anything it stands for the proposition that *Neher v. Harwood*, 128 Fed. (2d) 846 (C.C.A. 9), *has been overruled*.

The clear and unequivocal overruling of *Neher v. Harwood* by the *Williams* case is apparent upon examining the record. This Court decided the *Williams* case *per curiam* with the following opinion:

“Upon the authority of *Neher v. Harwood*, 9 Cir., 128 F.2d 846, 158 A.L.R. 1116, the judgment in this case is affirmed.” (158 F. (2d) 95.)

*Neher v. Harwood* is the case in this Circuit which had held that in the postal fraud cases the Postmaster General was an indispensable party *and was the only case upon which Judge Goodman relied in dismissing the complaint in the Braito case*. (Daggs, Tr., pp. 27-28.)

We discussed *Neher v. Harwood* at some length in our opening brief in the *Braito case* (pp. 9-16), but we unfortunately did not have before us at the time that brief was written the Supreme Court's decision in *Williams v. Fanning*. It now appears that the Supreme Court has come to the same conclusion that we did with respect to this matter of the indispensability of the Postmaster General in these suits.

The reversal by the Supreme Court of the rule of *Neher v. Harwood*, in the *Williams* case, was clearly the result of a realistic appraisal by the Supreme Court that the decree, in order to be effective, need not require the Postmaster General to do a single thing; that no concurrence on his part was necessary for his subordinate to carry out the mandate of the Court; that under the mandate of the Court the

subordinate not only could, but would be expected to, take action to afford the relief prayed for.

Here, too, there is no question but what the Commandant of the Navy Yard can afford the relief prayed for. The Commandant, not the Secretary, employs persons in a Civil Service capacity. (Cf. *Murphy v. United States*, 79 Fed. 255 (C.C.A. 9).) The Commandant, not the Secretary, compensates employees for services rendered. The Commandant, not the Secretary, pays accrued leave. To hold that merely because the Secretary is mentioned in the statute, despite the fact that the Commandant is the one who actually operates the Navy Yard, the Secretary is thereby an indispensable party is to indulge in a tenuous and highly technical line of thinking, the net effect of which is to deprive appellants and others similarly situated of any relief from the arbitrary acts not of the Secretary but of the Commandant himself.

For as we tried to make clear in the *Brailo* brief (pp. 11-12), *it is the subordinate officer (the Commandant) who failed to carry out the statutory duty imposed upon HIM*. In connection with the "full disclosure" provisions of the statute *the Congressional obligation was placed upon the subordinate officer and not upon the Secretary*.

Certainly the subordinate officer cannot fail to comply with the Congressional duty which is imposed upon him and then, when he is asked to account in a Federal District Court for his failure so to do,

hide behind the Secretary who in turn contends that he cannot be sued anywhere except in the District of Columbia. If such a contention is accepted by this Court it will in effect be reading out of the statute, the Congressional mandate that the discharged employee is entitled to be "fully informed" of the charges against him.

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#### IV.

##### THERE IS NO QUESTION OF CONTROLLING "EXECUTIVE DISCRETION".

The next point made by the appellee is that the action seeks to control the exercise of a discretionary function. This point was discussed by us in both opening briefs. All the cases cited, save for one, have already been analyzed. (*Daggs* brief, pp. 51-56; *Brait* brief, pp. 12-13.)

The only new case cited by the appellee is *U. S. ex rel. Greathouse v. Dern*, 289 U.S. 352. This case is cited for the proposition that under "normal conditions" courts have declined to control discretionary executive functions particularly where to grant the relief sought would be an idle act. Whether or not the case stands for such a broad proposition, it is apparent that the proposition contains its own qualifications. For the reasons which have heretofore been advanced, this case is not one which may be regarded as "normal." We will not repeat the arguments with respect to the outrageous and shocking (and for the purpose of the motions to dismiss, ad-

mittedly true) violations of appellants' constitutional and statutory rights. Those, we think, are adequately covered in the briefs heretofore filed.

We will point out that in the *Greathouse* case the situation was quite different from that at bar. There was there involved an effort to compel the Secretary of War to construct a certain wharf on the Potomac River. There was a serious question of whether or not petitioner had any clearly vested right to have the wharf constructed. Here there is no question that appellants had a vested Civil Service status before the conduct complained of occurred. All appellants here are seeking is the redress of a wrong which destroyed their vested status. There is no question that they are entitled to that which they are seeking.

Furthermore, in the *Greathouse* case it appeared that the very public lands upon which petitioner sought to have the wharf constructed were being utilized by the government for park, recreational and driveway purposes. The Court pointed out that the only effect of constructing the wharf as petitioner desired would be to increase the expense to the government because it would be required to destroy the wharf after its construction in order to operate the parkway and recreational facilities. Thus on the facts, the *Greathouse* case looked suspiciously like an attempt to make a raid on the government treasury which the Court properly rejected. There is nothing remotely resembling that situation here. All the appellants have ever asked is that the provisions

of the statute applicable to them be followed by the officers involved.

Finally, in the *Greathouse* case the Court said:

“\* \* \* Thus the extraordinary remedy by mandamus, invoked to protect rights to which petitioners are not shown to be clearly entitled, would be burdensome to the government without any substantially equivalent benefit or advantage to the petitioners or their vendee, apart from the incidental and irrelevant consequence that petitioners might secure the performance of their conditional contract.” (289 U.S. 360.)

Clearly, in the *Greathouse* case the act sought in view of the parkway construction would have been an idle act. That is not the case here. There is no indication that if the relief prayed for is granted it will not be effective and will not settle the rights of the appellants once and for all.

## V.

The next point raised by the appellee is that the amount claimed is beyond the jurisdiction of the District Court and it is contended that the jurisdiction is exclusively in the Court of Claims. This point was discussed by us at some length in the *Daggs* brief (pp. 56-57), and we respectfully submit that nothing new has been added by the appellee which requires further comment at this time.



## VI.

## THE SUIT IS NOT ONE AGAINST THE UNITED STATES.

The last point raised by the appellee is that the suits are in fact suits against the United States. This point, too, has been discussed by us in the *Daggs* brief (pp. 57-62). *Trancontinental & Western Air v. Farley* is discussed by us at page 57 of the *Daggs* brief and it is clear that that case stands for the proposition that a Court may act when the officer's conduct is "not within the authority conferred." Certainly the discharges of the appellants without meeting the statutory conditions of fully informing them of the reasons for the discharges were not within the authority conferred.

The only new case cited on this point by the appellee is *Mine Safety Appliance Co. v. Forrestal*, 326 U.S. 371. This case involved an action against the Secretary of the Navy for an injunction and a declaratory judgment seeking to set aside that officer's determination that the petitioner had received excessive profits on war contracts and that government disbursing officers should withhold further funds under the Renegotiation Act. The dismissal below was affirmed on appeal.

As the opinion indicates, and as Mr. Justice Reed points out in his concurring opinion, the petitioner completely failed to exhaust its administrative remedy. The Renegotiation Act provided that any contractor aggrieved by the Secretary's determination might apply to the Tax Court for a *de novo* trial

and adjudication of the issue. This the petitioner failed to do, so that the conclusion could very well have been reached upon the ground that the petitioner failed to exhaust its administrative remedy. In the cases at bar, the pleadings show that the appellants have consistently sought relief from the officers charged and it was only after repeated refusals by said officers to provide relief that appellants applied to the District Court. (*Daggs*, Tr. 5-8; *Braitto*, Tr. 16-21.)

It is true that Mr. Justice Black in delivering the opinion of the Court in the *Mine Safety Appliance Co.* case did say that the government was an indispensable party and that since it had not consented to be sued the complaint was properly dismissed. However, the distinction between the case and the one at bar is apparent. The Court pointed out that in the *Mine Safety Appliance Co.* case "the action which the Secretary proposed to take is not a violation of any express command of Congress." In the cases at bar, of course, the action has already been taken, has been taken by a subordinate official, not by the Secretary, and is clearly a violation of the express command of Congress. This is all alleged in the pleadings and for the purposes of the motion to dismiss these allegations must be taken as true.

The Court pointed out in the *Mine Safety Appliance Co.* case that in effect the action was one to recover a debt from the United States government. It was in reality a suit upon a contract for sums due

the contractor from the government. Such an issue could not be litigated behind the government's back without its consent. In our cases the "essential nature and effect of the proceeding as it appears from the entire record" (*Ex parte New York*, 256 U.S. 490) indicates to the contrary.

The entire statutory scheme set up by 50 U.S.C. App. 1156 turns upon giving to the person involved (the appellants here) the opportunity personally "to appear before the official designated by the Secretary concerned and be fully informed of the reasons for such removal, and to submit, within thirty days thereafter, such statement or affidavits, or both, as he may desire to show why he should be retained and not removed." It certainly was not intended by Congress that the vested Civil Service rights, which had been built up over a period of many years as a result of loyal and faithful service to the government, should be destroyed in the manner in which those of these appellants were destroyed without giving to the appellants the opportunity to defend themselves and to present evidence to show why such action should not be taken. The failure of the subordinate officer designated by the Secretary to follow the Congressional mandate vitiates the entire proceeding and in our opinion compels, despite all tenuous and technical objections to the contrary, the Court below to grant the relief prayed for.

For the foregoing reasons, it is respectfully submitted that the judgments and orders below, and each of them, should be reversed.

Dated, San Francisco,  
May 20, 1948.

GLADSTEIN, ANDERSEN, RESNER & SAWYER,  
NORMAN LEONARD,  
*Attorneys for Appellants.*

